STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY CLYDE SPARKS,

Defendant-Appellant.

UNPUBLISHED
July 22, 1997

No. 188878
Oakland Circuit Court
LC No. 95-137330-FH

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. He was sentenced to two years' probation, including ninety days to be served in the Oakland County Jail. Defendant argues that he was denied his Sixth Amendment right to call witnesses, due process and a fair trial when the trial court allowed only one character witness to testify and limited the testimony of defendant's rebuttal witness, as a result of defense counsel's failure to file a detailed witness list in response to the prosecution's pretrial discovery request. Defendant also alleges ineffective assistance of counsel, prosecutorial misconduct, and evidentiary error. We remand for an evidentiary hearing on defendant's ineffective assistance of counsel claim, and otherwise affirm.

I

Defendant first argues that the trial court violated his Sixth Amendment right to call witnesses and denied him a fair trial by allowing only one character witness to testify and limiting the testimony of his rebuttal witness. Under the circumstances presented here, we disagree.

Before trial began on July 24, 1995, the prosecution filed a request for discovery under MCR 6.201 on May 17, 1995, which requested "[t]he names and addresses of all lay and expert witnesses whom the defendant intends to call at trial." Defense counsel responded by letter dated June 30, 1995, which stated:

The Defendant may call the following persons as witnesses in the captioned matter:

1. Charles Stevens, nephew of the complainant, Susan Dodge.

2. Thelma Depew, current address unknown.

3. Numerous character and rebuttal witnesses.

The issue of defendant's failure to adequately respond to the prosecution's pretrial discovery request for the names and addresses of all expert and lay witnesses arose twice, once at the start of trial,[1] and again later the same day after the prosecution rested.[2] On the morning trial began, the prosecution raised, in connection with a motion in limine addressing other issues, that defendant did not comply with a discovery request, and that the prosecutor thus had received no witness list or other notice. The trial court decided the motion on other grounds,[3] and the discovery issue was not addressed until it arose again after the prosecution rested.

After the close of the prosecution's case-in-chief, the trial court stated it would take a short afternoon recess. The jury was excused and the following colloquy occurred:

> THE COURT: Miss Madzia [assistant prosecuting attorney], you had something you want to put on the record?
>
> MS. MADZIA: Oh, we do, your Honor, actually. Thank you.
>
> I was not made aware of any witnesses the Defense might call. I have a Motion for Discovery signed January 1st, of this year [1995]. We can request that and I believe it was filed May 17th,[4] and I didn't get a response back, so I am asking the Court to bar any witnesses other than the Defendant, based on the fact that there was no notice or knowledge to myself.
>
> MR. WILLIAMS [defense counsel]: Your Honor, I did send a letter dated June 30th, to Miss Madzia at the Prosecutor's Office stating that I would have --- one of my witnesses would be Charles Stevens, the nephew of the Complainant.
>
> And, I also named Thelma Depew, who I don't intend to call, and numerous character and rebuttal witnesses, who we wouldn't know until such time as trial.
>
> MS. MADZIA: I mean, I ---
>
> THE COURT: (Interposing) Why wouldn't you know character witnesses, you should have known those instantly?
>
> MR. WILLIAMS: Well, it was a question of finding out who was going to be in town.
>
> THE COURT: Well, when did you send her that?
>
> MR. WILLIAMS: June 30th.

MS. MADZIA: Your Honor, I have no doubt that if Mr. Williams told me he send [sic] it, then he did send me it. I am not doubting his integrity at all. I believe it must have been lost. But, I think that as to character witnesses I should have been informed and I wouldn't have been, even if I would have received that.

I have no problem with Mr. Stevens or Miss DePew. I mean, he can't be faulted for something I didn't receive.

THE COURT: I agree. I agree with that.

MR. WILLIAMS: Is the Court saying I can't have the character witnesses?

THE COURT: Well, you didn't – I didn't hear where you named them, you just said ---

MR. WILLIAMS: No, I did not name them in this letter. I just gave it to confirm ---

THE COURT: (Interposing) Did she specifically ask who they were?

MS. MADZIA: I did, your Honor.

MR. WILLIAMS: She asked for witnesses, or --- it was the usual request for discovery.

THE COURT: What about the new rule that Michigan adopted, I guess like they have in California, if you don't put them on the list you don't use them.

MR. WILLIAMS: I understand that, but if the Prosecutor wants to check their backgrounds, and that's all that we would have.

THE COURT: Right. And she didn't have anything to work with.

MR. WILLIAMS: Well, I would give her the opportunity, if the Court would give me the opportunity to do that.

THE COURT: Well, not in the middle of trial. She has already rested.

Well, I'll reserve on that, you are going to have, obviously, the two that you listed and the Defendant.

MR. WILLIAMS: And rebuttal witnesses, and we wouldn't know until today. We don't know what ---

THE COURT: (Interposing) I would agree with you on a legitimate rebuttal witness, but we are talking, I think basically, her objection at this juncture is strictly the character witnesses?

MR. WILLIAMS: That's correct.

THE COURT: Okay. The Court will be in recess.

* * *

THE COURT: The Court is ready to rule. The Court feels that the request by the Prosecutor wasn't answered, and therefore, the Court is going to limit the Defense to one character witness.

MS. MADZIA: Thank you, Judge.

THE COURT: So you have something so you can use it.

The defense called defendant, Charles Stephens, Roule McPhearson (as a character witness), and defendant's daughter, Cynthia Hammond, as a rebuttal witness. Defendant denied having assaulted complainant, although he testified that they had argued.

The trial court permitted only one of defendant's character witnesses to testify and limited the scope of Hammond's testimony. The latter occurred when the prosecutor objected during direct examination of Hammond, that she had had no notice that Hammond would be called. The trial court sustained the objection, and when defense counsel asked for the basis of the ruling, the court responded that Hammond was not listed as a witness. Defense counsel then argued that Hammond was a rebuttal witness, and that the defense did not know the victim was going to testify the way she did until that day. The trial court rejected these arguments, stating that it had made its ruling. The substance of Hammond's disallowed testimony was never placed on the record.

The jury found defendant not guilty of one count of felonious assault with a meat cleaver, and guilty of one count of felonious assault with a gun.

Defendant filed a motion to remand in this Court, seeking, among other things, a *Ginther*[5] hearing and to file a motion to set aside conviction, sentence and for a new trial. Appellate counsel argued defendant is entitled to a new trial because of his trial counsel's "failure to specifically list and/or name character and/or rebuttal witnesses." A panel of this Court denied the motion. Defendant's motion for rehearing was also denied.

II

Defendant argues, and the record supports, that the prosecutor conceded that defense counsel had sent the prosecution a letter responding to the discovery request, and that defendant should be

allowed to call the persons listed. At trial, defendant called one of the two persons specifically named in his response to the prosecution's request, and chose not to call the second person.

Defendant argues that the failure to specifically name the character witnesses should not be regarded as an especially culpable failure to comply with MCR 6.201 because the rules of criminal discovery are new and undeveloped in the case law; the practice of using general inclusive phrases to describe witnesses is very common in Michigan civil practice, and attorneys expect that if opposing counsel wants further details, he or she will make an informal request or file an appropriate motion under MCR 2.313 (which addresses motions for orders compelling discovery, and sanctions for failure to comply with such orders). Defendant further argues that the prosecutor was not prejudiced by the failure to specifically list the witness names because the prosecutor did not even know that the list had been submitted nor what names were listed, and because, as a practical matter, in a case of this nature, the prosecutor probably would have done little more to prepare for the character witnesses than to possibly run their driver license numbers through the LIEN to check for criminal convictions. Defendant argues that there were clearly reasonable and less drastic measures available to the court than witness preclusion. Further, defendant argues that the culpability of the prosecutor in creating this problem should not be overlooked. He argues that the prosecutor by her own admission commenced trial under the mistaken belief that the defense had filed no response to her discovery request, and that the error was thus harmless to the prosecution because listed character or other witnesses would not have been interviewed in advance of trial, regardless of the number of witnesses listed.

In *Taylor v Illinois*, 484 US 400; 108 S Ct 646; 98 L Ed 2d 798 (1988), the United States Supreme Court held that the sanction imposed by the state court of refusing to allow an undisclosed witness to testify, for the defendant's failure to identify a witness in response to a pretrial discovery request, was not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment, and found no error on the specific facts of the case. 484 US at 401; 98 L Ed 2d at 806. The defendant in *Taylor* was convicted of attempted murder. Well in advance of trial, the prosecutor filed a discovery motion requesting a list of defense witnesses.[6] Defendant's initial response identified two sisters who later testified and two men who did not testify. On the first day of trial, defense counsel was allowed to amend his answer by adding the names of two persons, neither of whom actually testified. On the second day of trial, after the prosecution's two principal witnesses had completed their testimony, defense counsel made an oral motion to amend his answer to discovery to include two additional witnesses, representing that he had just learned about them and that they had probably seen the entire incident in question. *Id.* at 403. In response to the court's inquiry about the defendant's failure to convey this information to counsel earlier, counsel acknowledged that defendant had told him earlier, but then stated that he had been unable to locate one of the witnesses. The trial court noted that the witnesses' names could have been supplied even if their addresses were unknown and directed counsel to bring the witnesses in the next day, at which time it would decide whether they could testify. The next day, the witness that counsel stated he had been unable to locate appeared, and counsel was permitted to make an offer of proof of the witnesses' testimony outside of the jury's presence. It was learned that the witness did not witness the incident, but saw the victim and several persons involved in the incident before it occurred. On cross-examination, it was learned that the witness had met the defendant more than two years after the incident, and the witness acknowledged that defense counsel had visited him at

home the week before trial began. *Id.* at 404-405. After hearing the witness testify, the trial judge concluded that the appropriate sanction for the discovery violation was to exclude the witness' testimony, noting that this was a blatant and willful violation of the discovery rules and that he had a great deal of doubt about the witness' veracity. The Illinois Appellate Court affirmed, holding that the decision of the severity of the sanction to impose on a party who violates discovery rules was within the trial court's discretion, and that the court in this instance did not abuse its discretion. *Id.* at 406.

The Supreme Court rejected the prosecution's arguments that no Compulsory Process Clause concerns were raised by authorizing preclusion as a discovery sanction, and also rejected the argument that a defendant's constitutional right to present evidence "may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness." *Id.* at 409.

The Supreme Court noted in a subsequent case, *Michigan v Lucas*, 500 US 145, 152; 114 L Ed 2d 205, 214; 111 S Ct 1743 (1991):

> We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be 'adequate and appropriate in most cases.' We stated explicitly, however, that there could be circumstances in which preclusion was justified because a less severe penalty 'would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.' *Taylor*, we concluded, was such a case. The trial court found that Taylor's discovery violation amounted to 'willful misconduct' and was designed to obtain a 'tactical advantage.' Based on these findings, we determined that, '[r]egardless of whether prejudice to the prosecution could have been avoided' by a lesser penalty, 'the severest sanction was appropriate.'

In the instant case, the prosecution concedes that under *Taylor*, a court may violate the Compulsory Process Clause of the Sixth Amendment by excluding material defense witnesses from trial under certain circumstances. However, the prosecution argues that *Taylor* is inapplicable because in that case the trial court "entirely" excluded witnesses and the excluded witnesses were material, not character, witnesses. The prosecution argues that by allowing defendant to call one of the several proposed character witnesses, the trial court in the instant case imposed a less drastic sanction than total exclusion. The prosecution further argues that defendant failed to proffer the testimony of the other character witnesses and has failed to argue how the absence of such testimony prejudiced him. As to the trial court's limiting Hammond's testimony, the prosecution argues that the admission of extrinsic evidence to prove a collateral matter is within the trial court's discretion and that defendant has failed to establish an abuse of discretion.

The question of discovery in a criminal case is committed to the discretion of the trial court. *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994). Discovery in criminal cases is governed by MCR 6.201[7], which provides in pertinent part:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a; MSA 28.1023194a), a party upon request must provide all other parties:
>
> (1) the names and addresses of all lay and expert witnesses whom the party intends to call at trial
>
> * * *
>
> (I) Violation. If a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy.

The prosecution is correct that defense counsel failed to make an offer of proof at trial regarding the testimony of the other potential character witnesses. We further note that the lower court record is devoid of any information from the defense as to who those character witnesses were, and what their testimony would have been. Although defendant on appeal argues that "seven witnesses were in the hallway ready to testify at trial," and has attached copies of subpoenas for Stephens and four other persons, this information does not appear on the record. Moreover, defendant on appeal only alludes specifically to one excluded character witness in his appellate brief—his ex-wife. Defendant argues that:

> The Court allowed only one [character] witness, (Roule McPherson) whose campaign for county commissioner Mr. Sparks had contributed money [sic]. Had other witnesses such as Defendant's ex-wife been allowed to testify the objectivity issue would have been erased and the total impact on the jury significant.

Further, the colloquy regarding Hammond's testimony did not establish what testimony defendant sought to elicit.[8] An offer of proof is generally necessary to preserve error in excluding evidence, unless the substance of the evidence excluded is sufficiently apparent from the context. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994).

Under these circumstances, where the court permitted defendant to present an unlisted character witness, where defendant failed to make an offer of proof regarding who he would have called and what the testimony would have been, and where the prosecution had rested, we cannot conclude that the trial court abused its discretion in limiting defendant to the one character witness.

III

We conclude, however, that defendant has shown that he is entitled to a remand for an evidentiary hearing on his ineffective assistance of counsel claim.

To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel performance fell below an objective standard of reasonableness and that the represenation so prejudiced him as to deprive him of a fair trial. *People v Pickens,* 446 Mich 248, 302; 303; 521

NW2d 797 (1994). Defendant must show there was a reasonable probability of a different outcome. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

Defendant argues that defense counsel's failure to detail witness names was likely outcome determinative and deprived defendant of a substantial defense. Defendant also argues that MRE 404(a)(1) allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime. *People v George*, 213 Mich App 632, 634; 540 NW2d 487 (1995).

No explanation is apparent for counsel's failure to file an adequate witness list or to make a record regarding excluded testimony. Such failures cannot be considered trial strategy.

Defendant must also establish prejudice. While we agree with defendant that, as there were no witnesses to the alleged assault, credibility was central to this case, we are unable to determine on the record before us whether there was a reasonable probability of a different outcome had defendant been allowed to call more than one character witness and had Hammond been allowed to testify more fully. Appellate defense counsel attached to defendant's appellate brief a letter from defendant's ex-wife,[9] and a letter from a long-time friend. While the friend's letter alone would seem to add little to Mcphearson's testimony, defendant's ex-wife's letter suggests that her testimony may have made a difference, especially in light of the fact that the jury apparently had doubts about complainant's credibility as it found defendant guilty of the allegations regarding the gun, but not the knife. We cannot, however, make this judgment based upon a letter. An evidentiary hearing is required where the excluded witnesses can be sworn, examined and cross examined.

Similarly, defendant argues that his rebuttal witness, his daughter Cynthia Hammond, was precluded from testifying regarding complainant's demeanor and conduct after the police left. However, the nature of the excluded testimony is not apparent from the record.[10]

Given these circumstances, we remand to the trial court for an evidentiary hearing regarding defendant's ineffective assistance of counsel claim. The court shall determine whether defendant has met the requirements of *Pickens*, *supra*.

IV

Next, defendant argues that the prosecutor improperly vouched for the credibility of Officer Johnny Colley.

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may, however, argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). It is improper for a prosecutor to ask the defendant to comment on the

credibility of prosecution witnesses, although such an error may not necessarily warrant reversal. *People v Buckey*, 424 Mich 1, 16-18; 378 NW2d 432 (1985).

Complainant's testimony at trial was in conflict with her preliminary examination testimony with regard to whether defendant was drinking prior to the assault. At trial, she testified that defendant had been drinking. The police testified that defendant appeared to have been drinking. By stating "the police thought he had been drinking, too, so that is a moot issue," the prosecutor did not improperly vouch for the police's credibility. Further, we conclude that any prejudice which may have resulted from this comment was cured when the trial court instructed the jury not to give special deference to the testimony of a police officer.

Defendant next argues that the prosecutor committed misconduct by asking defendant to comment on Officer Colley's credibility, and referring to the improper exchange during closing argument. Defendant did not object to the challenged remarks.

Appellate review of allegedly improper remarks is generally precluded absent a timely objection by counsel, unless a curative instruction could not have eliminated the prejudicial effect, or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

No miscarriage of justice is present here. While the prosecutor improperly asked defendant to comment on officer Colley's credibility, *Buckey, supra* at 14-16, and made improper remarks in closing argument, we conclude after reviewing the record that defendant dealt well with the questions, and that he has not shown prejudice.

Next, defendant argues that the trial court abused its discretion in excluding evidence regarding the complainant having set a fire in 1986 as part of a suicide attempt. Defense counsel argued during the prosecution's motion to exclude the evidence, that

> I would ask the Court to allow that evidence, it shows --- as part of our defense it shows that Miss Dodge had a scheme that she was going to follow, that she had in the past, that she had made threats, either made threats to hurt my client, or to kill herself, in order to stay with him, and eventually culminated in what we have here today. There was a pattern all through the relationship between Mr. Sparks and Miss Dodge that we would like the Jury to see. And, I think it is very important to our defense.

The trial court excluded the evidence on the basis that it was too remote, having occurred nine years before trial, and not germane.

Even assuming that defendant's characterization of the evidence is accurate, defendant is not entitled to a new trial on this basis. The incident occurred in 1986, about eight years before the complainant was allegedly assaulted by defendant. Complainant and defendant lived together from about 1989 through 1994. Under such circumstances, we conclude that the trial court did not abuse its discretion in excluding the evidence as too remote and not germane.

Affirmed in part, and remanded for a *Ginther* hearing. The hearing shall be conducted within 28 days of the release of this opinion. The trial court shall make findings of fact and a

determination on the record, and shall cause a transcript of any hearing on remand to be prepared and filed within 21 days after completion of proceedings. We retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] We thus reject defendant's argument that the prosecutor did not mention defendant's failure to file a witness list until after she had completed her case.

[2] The prosecution presented all its witnesses and rested on the first day of trial, July 24, 1995.

[3] Defendant was barred from presenting the evidence at issue, a suicide attempt by complainant, for the reason that it occurred nine years earlier, and was thus too remote. Defense counsel then placed on the record that the prosecutor had indicated she would introduce evidence of extrinsic acts (the prosecution's notice of intent to do so is in the lower court record), defense counsel then wrote requesting what the acts were so that he could defend against those, and that the prosecutor had not answered. Defendant's request for discovery of evidence of extrinsic acts is in the lower court record. The prosecutor responded that it was not other acts, but was assaults with a knife or gun occurring in defendant's home when he was intoxicated. The prosecutor argued that the transcript of the preliminary exam showed that defense counsel had so inquired of the victim at the preliminary exam. The court asked the prosecutor whether she answered defense counsel's request, and she said she had not. The court then denied the prosecutor's request, subject to the prosecutor bringing some law in to show it should be admitted. The court did not allow either counsel to inquire into this area.

[4] The prosecution's request for discovery is in the lower court record, and was filed May 17, 1995. It requested several items, pursuant to MCR 6.201, including:

> (1) The names and addresses of all lay and expert witnesses whom the defendant intends to call at trial.

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[6] The pertinent Illinois Supreme Court Rule, 413(d) states in pertinent part:

> Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
>
> (i) the names and last known addresses of persons he intends to call as witnesses . . .

[7] MCR 6.201 took effect January 1, 1995. That court rule, and not MCL 767.94a; MSA 28.1023(194a), governs criminal discovery. See MCR 6.201, Note, citing Administrative Order No. 1994-10.

[8] On appeal, defendant asserts that Hammond would have testified that complainant's demeanor changed after the police left.

[9] Defendant's ex-wife's letter, dated August 8, 1995, states:

> This letter is in regards to the character of Roy Sparks.
>
> I have known Roy for more than thirty nine years. We were married on July 31, 1956 till April 23, 1987. During all this time we lived in and around Hazel Park Mi.
>
> Roy was a very good father and a hard worker. He was also a good provider for his family, which was most important to him. For more than twenty five years he was a prominent businessman and community worker. He was always willing to help others in need.
>
> I have never known, or ever known anyone to have known Roy to have been a violent person. He never phsically [sic] abused or mistreated me or our children.
>
> We have been divorced for more than eight years and live in two different states, and still have a good relationship.
>
> Sincerely,
>
> Betty Sparks.

[10] We do not agree with the prosecution's argument that complainant's behavior after the alleged assault would be collateral. If Hammond would have testified that as soon as the police left, complainant's demeanor completely changed, from agitated to calm, the testimony would be directly relevant to complainant's credibility.