STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KONSTANTINOS SEVASTOPOULOS,

Defendant-Appellant.

UNPUBLISHED
November 13, 1998

No. 202559
Calhoun Circuit Court
LC No. 94-001469 FH

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault and infliction of serious injury, referred to as aggravated assault, MCL 750.81a; MSA 28.276(1), and felonious assault, MCL 750.82; MSA 28.277. He was sentenced to twelve months in jail for each conviction, to be served concurrently. He appeals as of right. We affirm.

I

At trial, the victim testified that she learned in early February 1994 that she was pregnant with defendant's second child. She was living with defendant and their daughter in an apartment at the time. She testified that when she told defendant of her pregnancy four or five days later, he became angry and told her that she was not having another child of his and that she would have to have an abortion or he would beat the child out of her. According to the victim, defendant then punched her several times in the stomach, pushed her around, and knocked her down a couple times.

The victim had an abortion on February 16, 1994. Four days later, on February 20, 1994, defendant returned home late in the evening and, according to the victim, defendant had been drinking. They began arguing over the victim moving out. She testified that defendant began slapping her in the face and knocking her down. He hit her with his fist on the right-hand side of her face. He also held her down on the floor and repeatedly lifted and slammed her head on the floor and kicked her several times in the stomach with a force strong enough to move her body across the floor. Additionally, defendant slammed the right-hand side of her face into the door several times.

The next day, she reported the incident to Officer Kevin Hoonhorst of the Springfield Police Department, who took pictures of the deep bruising on her face. She did not want to press charges at that time. That night, February 21, 1994, defendant became angry again, this time when she informed him that she had confirmed that defendant was having an affair with another woman. Defendant became violent and pinned her against the wall with his hands around her throat. She testified that she tried to phone for help, but that defendant grabbed the phone and threw the receiver at her, striking her in the chest and causing additional bruising. Defendant then chased her and got her to the floor, where he began kicking her in the right side of her face. A neighbor called 911 at her request and the police came and arrested defendant.

At trial, the victim claimed that as a result of the assaults, she suffered temporomandibular joint disorder, TMJ, a syndrome related to problems with the jaw joint. She also suffered extensive bruising on her face, chest, abdomen, legs and arms, and internal abdominal wall.

Defendant testified that he and the victim argued, but that he was never violent with her. He stated that on February 20, 1994, when he tried to leave the apartment, she blocked the door. He denied ever punching, slapping, or kicking her, but admitted that he tried to push her out of the way so he could leave. Defendant testified that they began arguing again the next night. They began pushing each other in the kitchen, but defendant testified that he never hit, kicked or threw anything at her.

II

We first consider defendant's claim that he was denied the effective assistance of trial counsel. Defendant claims that the totality of defense counsel's conduct at trial was completely deficient, effectively depriving him of counsel in violation of the Sixth Amendment. In support of this position, defendant relies on the Supreme Court's opinion in *United States v Cronic*, 466 US 648, 658-659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). We consider defendant's claim that he was denied effective assistance under both *Cronic* and the standard enunciated by the Court in *Strickland v Washington*, 466 US 668, 687, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because the circumstances of defendant's claim do not warrant a presumption that the defense was prejudiced and that the outcome of the trial was unreliable, and because defendant fails to show how the defense was prejudiced by specific errors of counsel, we find that defendant's claim fails under both the *Cronic* and *Strickland* standards.

A

In support of his claim for ineffective assistance of counsel under *Cronic*, defendant asserts that defense counsel failed: "(1) to inform Appellant about the potential [effects] of vacating his misdemeanor plea; (2) to investigate o[r] challenge the arrest warrant; (3) to conduct a preliminary examination or investigate prosecution threats; (4) to timely file motions; (5) to prepare for cross examination of witnesses; (6) to object to highly prejudicial and inflammatory testimony; (7) to consult with medical experts; or (8) to contact the neighbors in the apartment building including the woman from where the alleged 911 call was made." Defendant contends that in light of counsel's overall performance, he was denied the effective assistance of counsel. We disagree.

We do not find that defense counsel entirely failed to subject the prosecution's case to meaningful adversarial testing such that defendant was deprived of his Sixth Amendment right to effective assistance of counsel. In the instant case, defense counsel Robert Sharkey not only prepared for trial, but conducted himself as defendant's advocate before and during trial. Sharkey testified at the evidentiary hearing that he was qualified to handle defendant's case as he had handled over three-hundred felony cases and conducted about twenty-five felony trials. He also testified to the nature and extent of his trial preparation. Defense counsel's preparation apparently was effective, to a certain extent, in this case because defendant was found not guilty of the most serious charge, assault with intent to commit great bodily harm less than murder, and instead, was found guilty of the lesser included misdemeanor offense of aggravated assault. Additionally, the jury found defendant not guilty of assaulting his daughter. In any event, effective assistance of counsel is not the equivalent of successful assistance. *People v Tranchida*, 131 Mich App 446, 449; 346 NW2d 338 (1984).

Given the complexity of the facts in this case, it is clear that defense counsel adequately prepared for the litigation and conducted himself appropriately at trial. We conclude that Sharkey's representation in this matter did not entirely fail "to subject the prosecution to meaningful adversarial testing," *Cronic, supra* 466 US at 659, and thus does not constitute ineffective assistance of counsel.

B

Next, we address defendant's numerous specific allegations of error under the *Strickland* test. Unlike the *Cronic* test which addresses counsel's overall performance, the *Strickland* test addresses specific errors made by counsel, requiring defendant to show that counsel's performance was deficient and that the defective performance was prejudicial. *Strickland, supra*, 466 US at 687. In *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997), our Supreme Court stated that:

> [T]he *Strickland* test applied in Michigan requires that a defendant claiming ineffective assistance based on defective performance has the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different.

Defendant's claims of specific error in this case fail under the *Strickland* test because defendant fails to show how he has been prejudiced by any of the alleged errors: defendant fails to show how the claims of deficient performance by counsel "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

III

We next consider defendant's claim that the following constitutes prosecutorial misconduct requiring reversal of defendant's conviction: (1) the prosecutor withheld medical records containing exculpatory evidence; (2) the prosecutor presented false testimony; (3) the prosecutor improperly offered and introduced MRE 404(b) evidence; (4) the prosecutor failed to investigate the offense; and (5) the prosecutor delegated his responsibilities to the victim, allowing her to control the production of

evidence. Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

In this case, defense counsel failed to object to the various claims of misconduct, with the exception that he objected to the prosecution's failure to supply all of the requested medical records before trial. We find that a miscarriage of justice would not result if we do not address defendant's unpreserved claims of prosecutorial misconduct. Therefore, we address only defendant's claim that the prosecutor withheld medical records containing exculpatory evidence, keeping in mind that the test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant contends that medical records were not fully supplied to defendant until the eve of trial and then were only partially supplied. He further asserts that the prosecutor was still withholding some medical records at the time of the motion for new trial.

During the defense's pretrial motions heard on the morning of trial, the prosecutor acknowledged that his office should have supplied the defense with the medical records of Drs. Yankama and Zoutendam, whom he intended to call at trial, sooner than he did. The prosecutor also explained that the failure to do so was the result of oversight and was not intentional. Regardless, these medical records were sent to defense counsel on August 8, 1994, they were received by defense counsel three days later and, thus, defense counsel had them for approximately twelve days before trial. Additionally, the court stated that it would provide the defense with time to interview Dr. Yankama and Dr. Zoutendam before they testified at trial. Because the defense had these records well before trial and because the court gave defense counsel the opportunity to interview both doctors before they testified, it cannot be said that the prosecutor's conduct denied defendant a fair and impartial trial. See *id*.

Defendant also claims that the prosecutor failed to supply the defense with the medical records of Drs. Grubka and Kirkby. However, the statements made by the prosecutor and defense counsel at the pretrial hearing the day the trial was to commence indicate that the prosecutor did supply such medical records to the defense, albeit the day the trial started. Because these records were only a few pages and the trial lasted for three days, the defense had sufficient time to review them and make a determination as to whether it wanted to call either doctor as a witness at trial. Given these facts, we cannot conclude that the failure to provide these medical records earlier, in view of the fact that the prosecutor did not have them either and did not call either doctor to testify, deprived defendant of a fair and impartial trial.

Defendant also contends that the prosecutor improperly withheld some medical records at the time of trial because he believed that they were not relevant, and continued to withhold them even at the time of the motion for new trial. Defendant asserts that this constitutes prosecutorial misconduct.[1] However, it is unclear from defendant's brief or the evidentiary hearing exactly what records were withheld, which makes it impossible to determine whether the prosecutor improperly withheld them. Obviously, defendant was not entitled to all of the victim's medical records created over her lifetime, as

they would not all have been relevant to this proceeding. Defendant has not even provided us with information sufficient to determine whether an in camera inspection is required. Given the record before us, we cannot find that the prosecutor improperly withheld exculpatory medical records. Furthermore, defendant's failure to raise the discovery issue of these "other" medical reports before the trial court waives the issue on appeal. See *People v Malone*, 193 Mich App 366, 371-372; 483 NW2d 470 (1992).

IV

Finally, we consider defendant's claim that he is entitled to reversal of his conviction because the trial court: (1) should have granted defendant's pretrial request for an adjournment; (2) failed to require the prosecution to give notice of MRE 404(b) bad acts testimony; and (3) failed to sua sponte order the jury not to consider the victim's "expert" testimony. Defendant failed to preserve this issue for appeal because it was not set forth in his statement of the questions involved. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[1] We note that at the time of trial, criminal discovery was not generally authorized by statute or court rule, but principles of fundamental fairness entitled criminal defendants to discovery of information held by the prosecutor. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). The scope of discovery was in the trial court's discretion. *People v Wimberly*, 384 Mich 62, 69; 179 NW2d 623 (1970). To this end, our Supreme Court stated:

> Discovery will be ordered in criminal cases, when, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression. The burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party. [*Stanaway, supra* at 679, quoting *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960).]