

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CYNTHIA LEE McDONNELL,

Defendant-Appellant.

UNPUBLISHED

March 29, 2002

No. 226401

Leelanau Circuit Court

LC No. 99-001061-FC

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

PER CURIAM.

Defendant appeals by right from her conviction by a jury of first-degree, premeditated murder, MCL 750.316, for which the trial court sentenced her to life imprisonment without parole. We affirm.

Defendant first argues that the trial court erroneously admitted testimony that defendant had referred to the victim, her husband, by abusive and derogatory names. Defendant contends that the testimony was irrelevant and therefore inadmissible. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; see also *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). "Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

The trial court in the instant case did not abuse its discretion by admitting the challenged testimony. Evidence of marital discord is relevant in a murder trial involving a married couple, either to show motive or as circumstantial evidence of premeditation and deliberation. See *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Whether the marital discord would show a motive for murder is an issue of weight, not admissibility. *Id.*

Defendant also argues that the testimony should have been excluded because it was unfairly prejudicial. However, this issue is unpreserved for appeal because defendant objected to

the testimony below solely on relevancy grounds. See *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999) (“[t]o preserve an evidentiary issue for appeal, the party opposing the admission of evidence must object at trial on the same basis that the party asserts on appeal”). To avoid forfeiture of this unpreserved issue, defendant must demonstrate that (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error likely affected the outcome of the case. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant has not satisfied these elements. Indeed, because binding and applicable precedent supported admission of the testimony, see *Fisher, supra* at 451-453, no clear or obvious error occurred. Moreover, the jury heard ample additional evidence to support its verdict, including (1) defendant’s incredible and varied stories regarding the victim’s death; (2) evidence regarding the unlikelihood of suicide, given that the gunshot wound was in the back of the victim’s head; (3) defendant’s admission to police that she had tried to make the scene look like that of a robbery/homicide for insurance and last rites purposes immediately after discovering her husband’s dead body; (4) defendant’s mentioning on the night after the victim’s death that she was writing a book about how to commit the perfect murder; (5) evidence that defendant had withdrawn funds from a trust established for the benefit of the victim’s cousin; and (6) the absence of any plausible competing explanation for the victim’s death. Under the circumstances, the challenged evidence did not likely affect the outcome of the case. Reversal is unwarranted. *Wyngaard, supra* at 668.

Defendant additionally argues that her trial attorney rendered ineffective assistance of counsel by failing to object to the testimony on the basis of its potential for unfair prejudice. To establish ineffective assistance of counsel, a defendant must show that his counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel’s error or errors, it is reasonably probable that the outcome of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 302.

Defendant has not overcome the presumption that her counsel rendered effective assistance. Indeed, the challenged testimony was admissible under *Fisher, supra* at 451-453, and an ineffective assistance of counsel claim cannot be premised on an attorney’s failure to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Moreover, defendant has not shown a reasonable probability that the outcome of the trial would have differed but for counsel’s alleged error, given the abundance of additional evidence supporting the jury’s verdict. Reversal is unwarranted. *Toma, supra* 303.

Next, defendant argues that the trial court erred by failing to give a requested special jury instruction. This Court reviews jury instructions as a whole. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Even if imperfect, instructions do not require reversal if “they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.*

The requested instruction would have allowed the jury to infer that the top sheet and comforter from the bed on which the victim’s body was found, because they were not produced as evidence, could have been adverse to the prosecution. However, an adverse inference instruction is inappropriate if the failure to produce the evidence was not a result of prosecutorial

or police bad faith.¹ See generally *Davis, supra* at 515. No bad faith is apparent here. Indeed, the prosecution did not have a duty to preserve this evidence because it had no apparent exculpatory value. *People v Stoney*, 157 Mich App 721, 726; 403 NW2d 212 (1987). Police are not required to seek and find exculpatory evidence. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). The trial court did not abuse its discretion by failing to give the requested instruction.

Finally, defendant argues that the trial court abused its discretion by excluding evidence of a bankruptcy petition that the victim had filed on his cousin's behalf. Defendant contends that the victim's failure to report on the petition the existence of a depleted trust for which he was the trustee might have suggested a motive to commit suicide. However, because the connection between the bankruptcy petition and defendant's alleged suicide was attenuated at best,² the trial court did not abuse its discretion in excluding the challenged evidence. Indeed, a decision on a close evidentiary question ordinarily cannot be considered an abuse of discretion.³ *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Affirmed.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens

¹ We note that defendant herself washed the top sheet and comforter.

² In fact, it is not even clear that the trust was required to be reported on the bankruptcy petition.

³ Defendant also contends, briefly, that the exclusion of the bankruptcy petition prevented her from proving that the victim was in control of the trust. However, the jury saw photographic and documentary evidence that defendant had made several bank withdrawals from the trust. Evidence that the victim was the one authorized to control the funds only proves the point, unfavorable to defendant, that defendant's documented withdrawals were unauthorized.