STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ZAMBOROSKI,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 226296
Montmorency Circuit Court
LC No. 99-001174-FC

Before: Neff, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of first-degree murder, MCL 750.316, and sentenced to life imprisonment. He appeals as of right. We affirm.

First, defendant argues that the trial court erred in refusing to suppress his statements to the police, which defendant alleges were improperly obtained when the police continued to question him after he invoked his right to counsel. We disagree.

In *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981), the Supreme Court held that when an accused invokes the right to counsel during a custodial interrogation, the accused is not subject to further interrogation by the police until counsel has been made available, unless the accused initiates further communication, exchanges, or conversations with the police. The Supreme Court in *Davis v United States*, 512 US 452; 114 S Ct 2350; 129 L Ed 2d 362 (1994), further clarified that courts must determine whether the accused actually invoked the right to counsel and that this constitutes an objective inquiry. *Id*. at 458-459. If an accused makes reference to an attorney that is ambiguous or equivocal, in that a reasonable police officer in light of the circumstances would understand only that the accused might be invoking the right to counsel, the cessation of questioning is not required. *Id*. at 459. Thus, "after a knowing and voluntary waiver of the *Miranda*[1] rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Id*. at 461.

In this case, the police advised defendant of his *Miranda* rights at the time of his arrest and defendant said that he understood those rights. Defendant then asked to call his cousin Jerry. When an officer asked who that was, defendant indicated that Jerry was an attorney. However,

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

when the police told defendant that he would have to wait until arriving at the police post before making such a call, defendant said that he was willing to talk to the officer, as long as he could call Jerry later. Defendant at no time requested an attorney before questioning, either in the van or at the police post. Under these circumstances, defendant never unequivocally invoked his right to counsel. The trial court did not err in refusing to suppress defendant's statements on this basis.

Next, defendant argues that the trial court erred in denying his motions to suppress evidence that was seized pursuant to a search warrant. Specifically, defendant maintains that the affidavit in support of the warrant to search his cabin contained significant gaps and, therefore, could not have led a reasonably cautious person to conclude that there was probable cause to believe that cyanide would be found at his cabin. Additionally, he claims that there were material omissions from the affidavit, which misled the magistrate. We disagree.

"A magistrate may issue a search warrant only when it is supported by probable cause." *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). Probable cause sufficient to support a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that evidence of a crime or contraband may be found in the place requested to be searched. *Id*. "The magistrate's findings of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her." *Id.*, quoting MCL 780.653. Further,

> [w]hen reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner. This Court must then determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. [*People v Echavarria*, 233 Mich App 356, 366-367; 592 NW2d 737 (1999) (citation omitted).]

This Court should not invalidate the warrant by interpreting the affidavit in a hypertechnical manner. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000).

In this case, the affidavit stated that the victim died from poisoning, that two men arrived at the victim's house on May 15, 1999, and that one of them put something in her drink. The affidavit also indicated that defendant's fingerprints were found on a drinking glass at the crime scene, and that he was seen in Atlanta, Michigan, on the day that the victim was killed. The affidavit also indicated that the victim was scheduled to testify against defendant in a criminal matter, and that the victim had performed a witchcraft spell purporting to protect herself from defendant. Finally, the affidavit recounts how defendant told the police that he would do anything to keep from going back to prison. Considering the totality of the facts and circumstances alleged in the affidavit, there was a substantial basis for the magistrate's probable cause determination.

Moreover, we reject defendant's claim that the affidavit contained material omissions. Defendant had the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, omitted material

information from the affidavit, which affected the finding of probable cause. *Ulman*, *supra* at 510.

In this case, defendant contends that there two material omissions from the affidavit, namely: (1) that, while the affidavit stated that "Steve" was one of the men who came to the victim's house, it failed to indicate that a witness said that the other man who came to the house was named Mike; and (2) that the witness said it was Steve who put something in the victim's drink, rather than the unnamed man. Defendant argues that the omission of this information created the impression that he was the unnamed person with Steve and that he was the person who put something in the victim's drink.

While including both names may have caused the magistrate to wonder why defendant was not one of the two men named, it would not have excluded the possibility that the two men were using aliases. More significantly, even if the contested information had been included, there still would have been probable cause to issue the search warrant in light of the information that defendant's fingerprints were obtained from a drinking glass at the crime scene, that the victim was a material witness in a pending drug case against defendant, and defendant's statements that he would do anything to keep from going back to prison. Moreover, there was no evidence that the affiant intentionally or recklessly omitted the information. Accordingly, this issue does not merit reversal.

Next, defendant argues that the trial court abused its discretion in failing to rule on the prosecution's motion to admit evidence of defendant's prior convictions for purposes of impeachment, before he made his decision whether to testify. We disagree.

Because defendant did not request a ruling on the motion before announcing his decision not to testify, we conclude that this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Defendant's reliance on *People v Hayes*, 410 Mich 422, 427; 301 NW2d 828 (1981), and *People v Lytal*, 415 Mich 603, 609; 329 NW2d 738 (1982), in support of this issue is misplaced. In *Hayes*, the court conditioned the exclusion of evidence of the defendant's prior conviction on the defendant's impeachment of prosecution witnesses. *Hayes*, *supra* at 424. In *Lytal*, the trial court reserved ruling on the prosecutor's motion to admit evidence of a prior conviction until after the defendant testified. *Lytal*, *supra*. In this case, the trial court merely stated that it was taking the prosecutor's motion under advisement. Although defendant subsequently announced that he had decided not to testify, he never requested a ruling on the prosecutor's motion before making his decision, and the trial court never gave any indication that it was not going to rule on the prosecutor's motion before defendant testified. Under these circumstances, defendant has not identified a plain error affecting his substantial rights.

Next, defendant argues that the trial court erred in admitting evidence that he had cocaine and marijuana in his possession when he was arrested in October 1998. He asserts that this evidence was not logically relevant to motive and was unduly prejudicial. We disagree. Because defendant did not object to this evidence, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra*; *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), our Supreme Court held that evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. Establishing motive is among the purposes for which prior bad acts evidence is expressly permitted. MRE 404(b).

Here, the prosecutor offered *all* of the evidence concerning defendant's drug activities to show that defendant had a motive to kill the victim. Even though the victim might not have been a witness to defendant's possession of drugs on October 31, 1998, the evidence showed that defendant's arrest on that date was linked to the victim's cooperation with the police and her participation in earlier controlled purchases of drugs from defendant. Thus, the evidence was still probative of the existence of a motive to kill the victim, e.g., to "get even" with her. Moreover, the evidence was sufficiently probative to prevail under the balancing test of MRE 403. The evidence was powerfully probative of a primary issue in dispute, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The fact that the court gave a limiting instruction reduced the potential for unfair prejudice and protected defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Accordingly, this issue does not warrant reversal.

Furthermore, because the evidence was relevant to motive and was not unduly prejudicial under MRE 403, we reject defendant's claim that the prosecutor committed misconduct by introducing it. There was no plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Next, defendant argues that his conviction for first-degree murder was not supported by the evidence because the evidence failed to show that the victim was a peace officer or corrections officer. This claim is based on defendant's erroneous belief that he was charged and convicted of the murder of a peace officer or corrections officer. MCL 750.316(1)(c). However, defendant was actually charged and convicted of murder "perpetrated by means of poison, . . . or any other willful, deliberate, and premeditated killing." MCL 750.316(1)(a). Therefore, this claim is without merit.

Defendant next argues that the prosecutor erred by questioning a witness about religion, contrary to MCL 600.1436, which provides:

> No person may be deemed incompetent as a witness, in any court, matter or proceeding, on account of his opinions on the subject of religion. No witness may be questioned in relation to his opinions on religion, either before or after he is sworn.

Under this statute, it is improper for the prosecutor to question a witness about religion, about their religious beliefs or the religious beliefs of someone else. *People v Leshaj*, 249 Mich App 417, 418, 420; 641 NW2d 872 (2002); *People v Leonard*, 224 Mich App 569, 594-595; 569 NW2d 663 (1997). Although the prosecutor's questioning of a certain witness was facially violative of the statute, defendant did not object to the testimony at trial. Therefore, appellate

relief is precluded absent a showing that plain error affected defendant's substantial rights. *Carines*, *supra*.

In this case, the questioning merely established that that witness and the victim were Wiccans and what those beliefs were. "The purpose of the statute is to strictly avoid any possibility that jurors will be prejudiced against a certain witness because of personal disagreement with the religious views of that witness." *People v Jones*, 82 Mich App 510, 516; 267 NW2d 433 (1978). Even if the jury harbored some prejudices against that witness (or even the victim), defendant has not shown that his substantial rights were affected. Accordingly, this unpreserved issue does not warrant appellate relief.

Finally, defendant argues that he was denied the effective assistance of counsel. Because defendant did not raise this issue in a motion for new trial or evidentiary hearing in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985).

"A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden." *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984):

> "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* [*Carbin*, *supra* at 600.]

Defendant first argues that counsel erred in failing to raise a MRE 404(b) objection to evidence that he had drugs on his person at the time of his October 31, 1998, arrest. However, as previously discussed, this evidence was admissible under MRE 404(b). Accordingly, counsel was not ineffective for failing to object. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Next, defendant contends that counsel was ineffective for failing to seek records to corroborate a police officer's claim that the victim was scheduled to be a witness in criminal matters pending against defendant. Contrary to what defendant argues, there was other evidence, apart from the police officer's testimony, that the victim was an informant and scheduled to testify against defendant. Specifically, the prosecutor entered a certified copy of the notice of defendant's preliminary examination for the two drug charges he faced, which was scheduled to be held shortly after the date of the victim's death. Moreover, it is not apparent from the record that counsel failed to further investigate the situation concerning the victim's activities with the police. We also reject defendant's claim that motive was established by hearsay evidence, to which counsel failed to object. Mills' testimony that the victim was an informant who was

scheduled to testify against defendant did not involve an out-of-court statement and, accordingly, was not hearsay. MRE 801(c).

Next, defendant argues that counsel failed to discover and use the criminal records of prosecution witnesses for purposes of impeachment. Our review of this issue is precluded, however, because the factual predicate for defendant's claim is not apparent from the record. *Carbin, supra* at 600.

Finally, because the record does not indicate that defendant was charged with the murder of a peace officer, we reject defendant's claim that counsel was ineffective for not challenging the sufficiency of the evidence for that offense.

Defendant has not sustained his claim of ineffective assistance of counsel.

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell