STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 20, 2005
v	No. 255405 Livingston Circuit Court
MONICA ANN JAHNER, Defendant-Appellee.	LC No. 77-001715-FY

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Following retrial before a jury, defendant was convicted of conspiracy to commit first-degree murder, MCL 750.316(a) and MCL 750.157a, and conspiracy to commit assault with intent to commit murder, MCL 750.83 and MCL 750.157a.[1] Defendant was sentenced to natural life on the conspiracy to commit first-degree murder conviction, and to ten to twenty years' imprisonment on the conspiracy to commit assault with intent to commit murder conviction.[2] Defendant's subsequent motion for relief from judgment was granted by the circuit court, and we granted the prosecutor's interlocutory application for leave to appeal. Plaintiff's sole argument on appeal is that the trial court abused its discretion when it granted defendant's motion for relief from judgment. We agree and reverse the decision of the circuit court granting the motion for relief from judgment.

Defendant was tried for conspiring to kill her stepmother, Sandra Jahner, by hiring a hitman. The self-confessed hitman, Roy Catlett, testified at trial that defendant had hired him to kill her stepmother, for which Catlett was to be paid $5,000. After gaining entry to Sandra Jahner's home, Catlett struck and strangled the victim. The victim eventually recovered from her

[1] Defendant's first conviction was reversed in *People v Jahner*, unpublished opinion per curiam of the Court of Appeals, issued March 19, 1980 (Docket No. 78-1669).

[2] On remand from our Supreme Court, *People v Jahner*, 428 Mich 888; 403 NW2d 810 (1987), this Court held by order that defendant's conspiracy to commit first-degree murder conviction was a nonparoleable offense. *People v Jahner*, unpublished order of the Court of Appeals, entered March 22, 1988 (Docket No. 100089). Our Supreme Court reversed this holding in *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989).

injuries and testified at trial. Approximately two weeks after the attack, Detective Robert Salem arrested Catlett on an unrelated charge. At the heart of this appeal is an undated supplemental police report that was not provided to defendant at trial and which defendant did not discover until 2000. The report reads in pertinent part as follows:

> Det. Salem arrested a person named Roy Lee Catlett and Patty Jane Schwartz for an armed robbery in Dearborn Heights. An inventory search of the property of Patty Schwartz revealed a letter in the lining of her coat. Det. Salem questioned Patty about the letter and she stated she had gotten it from a girl named Monica who ran a drapery store in Redford Twnship [sic]. Monica had told her to give it to a person named Dan and to tell him there is $5000.00 in it for him. Patty is not charged in connection with the robbery and leaves the State to go to New York.

This Court reviews a trial court's grant of relief from judgment for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). An abuse of discretion is found only where "'an unprejudiced person considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made.'" *Id.* at 685 quoting *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000) (additional language added by *McSwain* Court). We review for clear error a trial court's findings of fact supporting its ruling. *Id.* at 681. A clear error is found "'if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made.'" *Id.* at 682 quoting *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

Defendant moved for relief from judgment pursuant to MCR 6.508(D), which provides in pertinent part as follows:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion:
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> * * *
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. [MCR 6.508(D).]

For purposes of this appeal, actual prejudice is defined to mean that "defendant would have had a reasonably likely chance of acquittal" in the absence of the alleged error, or that "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand." MCR 6.508(D)(3)(b)(i), (iii).

There is no dispute that defendant had good cause for failure to raise this ground for relief earlier. The record clearly establishes that defendant did not discover the report until well after her previous appeal had been resolved. However, defendant cannot establish the requisite actual prejudice.

Defendant argues that the failure to provide the police report violated the rule of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 25 (1963). In order to establish a *Brady* violation, a defendant must prove the following:

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).]

"Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Id.* quoting *United States v Bagley,* 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985) (citations omitted). Moreover, the prosecutor is under a duty to disclose any information that would materially affect the credibility of his witnesses. *Id.* at 281.

In the present case, there is no question that the prosecution possessed the report and that defendant neither possessed nor could have obtained the report with reasonable diligence. Further, the record shows that the prosecutor suppressed this evidence in the sense that it was not provided to defendant. See *People v Amison*, 70 Mich App 70, 77; 245 NW2d 405 (1976) (observing that evidence lost by the police or prosecution "is deemed 'suppression' regardless of intent"). However, defendant has not proved that the police report was favorable to her or that the outcome of trial would have been different had the report been timely provided. [3]

It is true that the suppressed report introduced a possible new suspect into the case—the person identified as "Dan"—and raised the possibility that Schwartz, Catlett's then girlfriend, might have been involved in the conspiracy. However, the mere fact that other people could have been involved does not necessarily imply that defendant was not involved. Indeed, the cited language from the report directly points to defendant's involvement.

It is also true that the report may have provided an additional tool by which defendant could impeach the testimony of Salem and Catlett. Contrary to the information in the report, Salem testified at trial that Schwartz had told the officer that Catlett had given her the map and information sheet found in her coat at the time of her arrest. However, even if Salem's testimony was totally rejected by the jury due to this discrepancy, the remaining evidence of record was more than sufficient to support defendant's conviction. As a result, we believe that even were

[3] Consideration of this latter point overlaps our consideration of the actual prejudice prong of the relief from judgment court rule. MCR 6.508(D)(3)(b)(iii).

defendant to have used the suppressed evidence to impeach Salem, the impact on the case would have been minimal.

The impact on Catlett's testimony, and thus, the trial was also minimal, although we acknowledge that the lack of availability of the report was of consequence given the importance of his testimony to the prosecution's case in chief. Catlett testified that he received the documents in issue from defendant by means of an intermediary not identified in the report. This testimony clearly conflicted with the information contained in the report. The report, however, was not the only means available to defendant to challenge Catlett's credibility. At trial, defendant questioned Catlett in detail about Catlett's extensive drug habit at the time of the assault. Indeed, Catlett admitted that this habit sometimes left him in a dream state in which he did not know what he was doing. In addition, defendant questioned Catlett at length regarding possible motives to lie, which included the possibility that Catlett could receive a substantially shorter prison sentence for his own involvement in the crime. Moreover, while the report would have provided defendant with an opportunity to suggest to the jury that, contrary to Catlett's testimony, additional people were involved in the assault, the report does not show that defendant was not involved or that Catlett had not participated.

Additionally, we note that the police report provides strong evidence tying defendant to the crime. It suggests that, regardless of whether someone named "Dan" was approached by defendant, it was defendant who was driving the conspiracy. The report notes that Schwartz identified "Monica who ran a drapery store in Redford Twnship [sic]," as the architect of the attack. This description points directly to defendant.

Accordingly, given the balance between the impeachment value of the report and the evidence it provides of defendant's involvement in the conspiracy, we conclude that the circuit court erred in finding that the suppressed evidence was favorable to defendant. For the same reasons, we also believe the court erred when it concluded that the outcome of trial would have been different had the report been timely disclosed.

We also reject the argument that had the report been timely provided, the trial court would have classified Schwartz as a *res gestae* witness, and that defendant would have been entitled to a missing witness instruction when the prosecution failed to produce Schwartz at trial. While the court did not explicitly name Schwartz as a *res gestae* witness, it nonetheless ordered the prosecution to produce her at trial. Further, defendant would have been entitled to the missing witness instruction only if the prosecution failed to exercise due diligence in finding and producing Schwartz. *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004). Here, the trial court held a hearing addressing this very question and explicitly found that the prosecution had exercised due diligence in attempting to locate and produce her as a witness.

In sum, the circuit court erred when it found that a *Brady* violation had occurred. Moreover, because no *Brady* violation occurred, defendant has not shown the requisite actual prejudice to warrant relief from judgment. MCR 6.508(D).

Reversed and remanded for reinstatement of the judgment of conviction. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio