

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY CLYDE SPARKS,

Defendant-Appellant.

UNPUBLISHED

July 10, 1998

No. 188878

Oakland Circuit Court

LC No. 95-137330-FH

AFTER REMAND

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

PER CURIAM.

Following a jury trial, defendant was convicted of one count of felonious assault involving a gun, MCL 750.82; MSA 28.277, and acquitted of a second count of felonious assault involving a knife, in connection with allegations made by his live-in girlfriend, Susan Dodge, on December 25, 1994. Defendant was sentenced to two years' probation, including ninety days to be served in the Oakland County Jail. Defendant appealed to this Court, and we remanded to the trial court for a *Ginther*¹ hearing regarding defendant's ineffective assistance of counsel claim, otherwise affirming. *People v Sparks*, unpublished opinion per curiam, issued July 22, 1997 (Docket No. 188878). On remand, the trial court held an evidentiary hearing on November 10, 1997, at which witnesses who had been excluded at trial gave testimony and a rebuttal witness who had testified at trial, but whose testimony had been limited, amplified her testimony. The trial court concluded in its opinion that defendant failed to carry his burden of establishing that the excluded testimony would likely have caused a different result, and that because defendant suffered no actual prejudice, his ineffective assistance of counsel claim failed.

After the post-remand evidentiary hearing, this Court granted defendant's motion to file a supplemental brief.² Defendant's supplemental brief argues that he established that trial counsel's failure to set forth names of various witnesses, and the trial court's consequent ruling permitting only one character witness to testify and limiting the testimony of his rebuttal witness, was likely outcome-determinative and denied him the ability to present a viable defense. We agree that defendant has shown that there was a reasonable probability of a different outcome, *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995), and reverse and remand for a new trial.

I

We quote pertinent parts of our initial opinion in this case because they bear on the issue before us:

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.

* * *

[Because of trial counsel’s failure to file a detailed witness list, the trial court limited the defense to one character witness.]

* * *

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. [Emphasis added.]

Our initial opinion noted in connection with defendant's argument that the trial court should not have precluded witnesses from testifying because there were less drastic measures available to the court:

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. 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.

* * *

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[s] performance fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Pickens*, 446 Mich 248 [sic 298], 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, 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.**

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*. [Emphasis added.]

II

Following the evidentiary hearing on remand, the parties submitted proposed findings of fact and conclusions of law. The trial court's opinion adopted the prosecution's findings of fact and conclusions of law in their entirety.

A

Defendant challenges the trial court's finding that at the post-remand hearing, "defendant called long-time friends who offered testimony almost identical to that of Mr. [Roule] Mcphearson," who had testified at defendant's trial. The trial court concluded that the exclusion of these character witnesses was not likely to produce a different result and that defendant therefore had not shown actual prejudice. We disagree.

At trial, Mcphearson testified that he had lived in Hazel Park all his life, was an Oakland County Commissioner, a court officer at the court in Hazel Park, and had known defendant for about thirty years. Mcphearson testified that he went in defendant's restaurant once a week or so, that defendant contributed supplies or food from his restaurant for civic events, and that defendant sponsored the senior citizens' softball team. When asked what defendant's reputation for truth and honesty was, Mcphearson responded:

Oh, well, when he says something you can rely on it, and I have never heard him say anything that led me to believe he was not one to tell the truth.

Mcphearson testified that he had never heard anybody say that defendant was not trustworthy, and that defendant's reputation was of being hard-working, being at the restaurant every day, and being a person that would take the time to inquire of his restaurant's patrons how they were.

On cross-examination, Mcphearson testified that he was a county commissioner for defendant's district and that defendant had contributed money to his campaign. Mcphearson's testimony ended on this note; defendant's trial counsel did not try to rehabilitate Mcphearson.

Although all the character witnesses at the post-remand evidentiary hearing addressed defendant's reputation for truthfulness, some also addressed whether defendant was known to be violent and whether he was ever observed to be intoxicated, matters about which Mcphearson was not questioned. Unlike Mcphearson, who testified that defendant had contributed to his campaign and was not thereafter rehabilitated, none of the character witnesses at the evidentiary hearing were shown to have such a potential bias. The character witnesses knew defendant in differing contexts, were of differing age groups and were of varied backgrounds: from being defendant's neighbor, to doing roofing work on defendant's restaurant and elsewhere, to being a regular patron of the restaurant and playing golf with defendant, to working with defendant on political activities. The character witnesses were a local business owner, mayor and special education teacher, truck-driver, attorney and magistrate, and retired roofer, and included persons in their 30's and 50's or 60's. All five witnesses testified that they were waiting in the hallway at trial to testify in defendant's behalf, and would have done so regardless of being subpoenaed. They also testified they would have testified at the evidentiary hearing without being subpoenaed. All of the character witnesses were precluded from testifying at trial because of trial counsel's failure to provide the prosecution with a detailed witness list. All testified that they were aware of defendant's conviction, and that it did not change their opinion that he was truthful and honest.

B

Defendant also argues that Hammond's post-remand rebuttal testimony contradicted Dodge's testimony beyond the issue whether defendant had been drinking on the date in question. We agree with the trial court that Hammond's post-remand testimony that defendant had not been drinking on the date in question had already been given at trial.³ However, Hammond's testimony at the post-remand hearing regarding Dodge's demeanor and motivation on the evening in question was not elicited at trial.⁴

At the post-trial evidentiary hearing on remand, Hammond reiterated her earlier testimony that defendant was at her house twice on the date in question, and that defendant did not consume any alcohol during either visit, or appear to have consumed any alcohol when he visited either time. Hammond testified that she would have detected alcohol on his breath had he been drinking because she kissed and hugged him. Hammond expanded on her trial testimony, testifying that her father is not a drinker; she had never seen him intoxicated; that through the years, defendant's family had a tradition of not allowing alcohol in their home on Christmas; and that consuming alcohol "was something we never did on Christmas."⁵ Hammond provided further testimony that she grew up at home with defendant and her mother, Betty Sparks, and that defendant had never physically assaulted either her or her mother.

Hammond testified that on the date in question, after defendant left her home around 4:30 p.m., defendant called her around 11:00 or 11:30 p.m., sounded upset and said that Dodge had called the police on him and that the police were coming to take him. Hammond testified that she and her husband arrived at defendant's house within ten minutes of defendant's phone call, and that Dodge was there with two police officers, but defendant was gone.⁶ Hammond testified that Dodge had no cuts or bruises, her hair was not disheveled, and that her clothes were not rumpled or torn. Hammond further testified that Dodge was not crying, "seemed collected," and was sitting at the dining room table apparently giving a statement to the police "in a very calm manner." Hammond testified that the house was not in disarray, and looked normal. Hammond testified that she spoke to Dodge, asking her why she continued to stay at the house although her relationship with defendant was deteriorating, and that Dodge responded. Hammond testified:

She just stated to me that she felt that she had put in so much hard work and effort, and that she wasn't planning on going anywhere, that that was her home, and that it was going to be her home, and that she was not leaving. That was her response to me.⁷

We conclude that Hammond's testimony regarding Dodge's demeanor and her discussion with Dodge after defendant was arrested was not duplicative of trial testimony, very likely would have been presented at trial but for trial counsel's failure to provide the prosecution with a detailed witness list, and should be presented to the jury on retrial.

This case turned on credibility. There were no witnesses to the alleged assault other than Dodge and defendant. The character witnesses who were present at trial to testify on defendant's behalf, but who were precluded from doing so because of trial counsel's failure to file a detailed witness list, gave testimony at the post-remand evidentiary hearing which was not duplicative of Mcphearson's. The character witnesses addressed matters Mcphearson was not questioned about, including defendant's being non-violent, and his never having been known to be intoxicated.⁸ Further, they appear to have had closer relationships with defendant, and were not impeached the way Mcphearson was at trial. As discussed above, Hammond's rebuttal testimony was limited at trial because of trial counsel's failure to list her on the witness list, and she consequently did not testify regarding Dodge's demeanor or physical condition shortly after the alleged assault, or regarding her discussion with Dodge after the alleged assaults took place.⁹

Trial counsel's unprofessional errors of not filing an adequate witness list and not making a record regarding the excluded testimony foreclosed to a great extent defendant's absolute right to introduce evidence of his character for truthfulness and non-violence. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986); *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); MRE 404(a)(1). We conclude that the trial court erred in determining that defendant failed to establish that the excluded testimony would likely cause a different result and that defendant was not afforded ineffective assistance of counsel because he suffered no actual prejudice. Defendant has shown a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

Accordingly, we reverse and remand for a new trial.

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

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² This Court also allowed the prosecution twenty-eight days within which to file a post-remand brief. The prosecution did not file a post-remand brief, however.

³ Hammond testified at trial that on December 25, 1994, defendant came to her house twice, once around 10:30 a.m. to drop gifts off for Hammond's children, and again around 2:30 p.m. and that he stayed until 4:00 or 4:30 p.m. Hammond testified that defendant drank coffee while he was there and that he had not been drinking:

. . . He's my Dad, I've know [sic] him for all my life, and know how he --- I have seen my father when he is drinking, or has had, you know, a drink or two. So, I would be able to tell if he had been drinking. And, he had not been.

⁴ Hammond testified at trial as a rebuttal witness. However, the trial court limited her testimony after the prosecution objected during direct examination that it had no notice that Hammond would be called. After testifying that her father had not been drinking, Hammond testified that defendant called her that night and that she and her husband arrived at his house between 11:00 and 11:30 p.m. When they arrived, Dodge was there, a police officer was taking a report from Dodge, and another police officer was also present. When Hammond was asked whether she had had an opportunity to speak to Dodge after arriving at defendant's house, the prosecutor objected, the objection was sustained and defendant's trial counsel asked no more questions of Hammond.

⁵ Defendant testified at trial when asked whether he had anything alcoholic to drink on December 25, 1994, that “Never on Christmas, there is no alcoholic beverages around my family on Christmas at all, never * * * it is just a rule that we have never had alcoholic beverages around on Christmas, never.”

⁶ We recognize that in his initial appellate brief, defendant asserted that Hammond “would have testified to Susan Dodge’s complete change of demeanor **once the police left**,” while defendant’s post-remand brief argues that Hammond testified at the post-remand hearing “to Dodge’s complete change in or different demeanor **after the police had arrested/left with her father**. She was not shaking, frightened, crying, etc.” The record is clear that Hammond was not present and observing Dodge when the police left defendant’s home altogether, and that defendant’s post-remand characterization of her testimony is accurate.

⁷ We reject the trial court’s finding that Hammond’s testimony at the post-remand evidentiary hearing was not in conformity with her affidavit. The affidavit was filed in connection with defendant’s motion to remand and motion for rehearing of that motion and stated that she was prepared to offer additional testimony at trial that had been reviewed with defendant’s trial counsel that she was not permitted to give in court, including, but not limited to

Susan Dodge was neither upset or out of control when I returned to my father’s home at about 11:00 p.m. or 11:30 p.m. on the night this incident is alleged to have taken place; further, ROY SPARKS was not drunk, nor did it even appear that he had been drinking that evening and Susan Dodge stated that she would get all of Defendant’s money/property or see him dead.

At the post-remand hearing, Hammond testified in accordance with the affidavit regarding Dodge’s demeanor and her father’s drinking. Regarding the home, Hammond testified that Dodge said the home was going to be hers and she was not leaving.

⁸ Defendant’s drinking was an important issue at trial. Dodge testified at the preliminary examination that she had “no idea” whether defendant was drinking on the date in question. At trial, defense counsel impeached her with this prior testimony. Dodge then testified that “By his slurring of the words and the way he acted, I believed that he was drinking.” Dodge testified that defendant had consumed a lot of alcohol in the months before the incidents at issue and that she and defendant had gotten into several arguments when he drank. Defendant denied this.

⁹ Defendant asserts that Dodge’s statement to Hammond is relevant to her attitude toward defendant and her motive in accusing him. Defendant asserts that Dodge accused him of assault in order to remove him from the house and gain control over it.