STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2001
v	No. 212825 Oakland Circuit Court
MONICA L. NOWOS, Defendant-Appellant.	LC No. 97-151404-FC

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321, MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). She was sentenced to a term of five to fifteen years' imprisonment for the manslaughter conviction, and a consecutive two-year term for the felony-firearm conviction. She now appeals as of right. We affirm.

Defendant's conviction arises from the shooting death of her sister's husband, Michael Hockenberry, which occurred outside defendant's home. Defendant had obtained a shotgun from the house and shot the victim while he was sitting in his car.

Defendant argues that the trial court erred by refusing to admit the testimony of her expert witness on the battered woman's syndrome. We disagree. The testimony was not relevant because there was no allegation that defendant herself was a battered woman. Further, as the trial court properly recognized, this was not a trial about the marriage between defendant's sister, Lydia Nowos, and the victim. Although testimony on "battered woman's syndrome" might be necessary in some cases to explain the conduct of a party or a participant in the offense, no such necessity appears in this case. The trial court did not abuse its discretion in refusing to admit this testimony. *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995).

Next, we reject defendant's claims that the trial court erred by denying her access to a closed prosecution file. The record does not indicate that defense counsel ever requested access to the file. Rather, counsel acquiesced to the trial court's decision to allow the file to be examined by the defense witness. Under these circumstances, because defendant never sought an in camera review of the file, or asserted a need to independently review the contents of the file, and assented to the trial court's decision to allow the defense witness to examine the contents of

the file, she may not now claim error on the basis of this issue. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Defendant also asserts that she was denied a fair trial because the prosecutor did not turn over photographs of Lydia Nowos and her child to the defense. We disagree. A defendant's right to due process of law is violated when the prosecution suppresses evidence favorable to the accused that is material to guilt or to punishment. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish a *Brady* violation, a defendant must prove that: (1) the state possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to defendant, a reasonable probability exists that the outcome of the trial would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). The test for whether the evidence should be provided is whether it contains information that would probably have changed the outcome of the trial. *Id*. Undisclosed evidence is considered material only when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v Whitley*, 514 US 419, 435; 115 S Ct 1555; 131 L Ed 2d 490 (1995); *Lester*, *supra* at 282.

In this case, the prosecution provided all of the police reports involving the incidents of domestic violence between the victim and his wife to the defense. One of the reports made reference to the fact that the photographs were taken. Defendant was aware of the specific incident depicted in the photographs, that involving an incident in which Lydia Nowos and her child were injured when the victim broke a car window; in fact, defendant testified for the defense about the incident, describing the injuries to Lydia and her child. We fail to see how the failure to produce photographs, which only depicted what was described in police reports and testified to by defendant, could undermine our confidence in the verdict. No *Brady* violation has been shown.

Next, defendant claims that the trial court abused its discretion by allowing the prosecutor to impeach defendant with evidence from her day planner. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995); *People v McGillen #1*, 392 Mich 251, 266; 220 NW2d 677 (1974). Defendant characterizes the evidence as impeachment on a collateral issue, and argues that the evidence was not inconsistent with her testimony. We disagree. The impeachment evidence went to defendant's state of mind. She had testified as to her fear of the victim, thus bolstering her claim of self-defense. The day planner showed her frustration with the police and the courts in their treatment of the victim, and her perception that they were "crooked." While defendant's testimony that she was afraid of the victim was not directly contradicted by these statements, the prosecution's evidence constituted a proper response to defendant's testimony, and thus was admissible. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). The evidence tended to impeach defendant's claim about her state of mind, and thus was admissible for purposes of impeachment. See *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985).

Defendant next argues that the trial court erred by failing to instruct the jury in accordance with CJI2d 7.17, that she had no duty to retreat on her own property. Because defendant never requested such an instruction at trial, this issue is not preserved. Accordingly,

appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). In this case, the charged offense occurred outside defendant's home. That being the case, the no-retreat rule was not applicable. *People v Kulick*, 209 Mich App 258, 264-265; 530 NW2d 163 (1995), remanded on other grounds 449 Mich 851 (1995); *People v Drake*, 142 Mich App 357, 361; 370 NW2d 355 (1985); *People v Godsey*, 54 Mich App 316, 321; 220 NW2d 801 (1974). Thus, no plain error has been shown.

Next, defendant argues that the trial court erred by allowing police testimony about used human silhouette shooting targets that were observed in defendant's home after the police entered the home in accordance with a condition of defendant's bond whereby defendant waived her right to be free from an unreasonable search and seizure. Initially, we note that this issue is not identified in defendant's statement of questions and therefore is not properly before this Court. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Furthermore, defendant did not preserve this issue with an appropriate objection to the police testimony at trial, raising the same argument that she now raises on appeal. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Regardless, the record indicates that defendant expressed satisfaction with her bond conditions in the district court and, therefore, may not now claim error on appeal regarding the acceptance of those conditions. *Barclay*, *supra* at 673. Further, we are satisfied that the bond condition was reasonable to ensure the safety of the public. MCR 6.106(D)(2)(n). The trial court did not err in allowing police officers to testify that they saw used human silhouette shooting targets in defendant's home, which they observed during the execution of a valid search warrant on the day of the shooting.

Next, defendant claims that resentencing is required because the trial court accepted the written statements of the victim's parents in the presentence report as "victim impact statements" under the crime victim's rights act, MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq.* We agree that, because there was a surviving spouse, the victim's parents were not victims as defined in MCL 780.752(1)(i); MSA 28.1287(752)(1)(i). Even though the victim's parents were not victims for purposes of the crime victim's rights act, however, the trial court was not precluded from considering their statements for purposes of sentencing, considering that a presentence report properly may contain a broad range of information so that the sentence can be tailored to the circumstances of the individual offender. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994); *People v Kisielewicz*, 156 Mich App 724, 729; 402 NW2d 497 (1986). Moreover, as this court has noted previously, "We are confident that trial judges of this state are able to separate the evidence at trial from the subjective requests of victims or their family members as stated in letters submitted to the court." *People v McAllister*, 241 Mich App 466, 476; 616 NW2d 203 (2000). We conclude that the written statements of the victim's parents were properly included in the presentence report and given their proper weight by the court. We also conclude that defendant's sentence for manslaughter does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990); *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

Defendant's claim that the trial court erred by failing to consider her post-conviction motion under MCR 7.208 is moot, because this Court subsequently granted defendant's motion to remand, following which the trial court considered defendant's motion. This Court will not

consider defendant's claim further. *People v Pennington*, 240 Mich App 188, 197; 610 NW2d 608 (2000).

Regarding the issues raised in defendant's supplemental brief after remand, we find no basis for reversal. First, contrary to what defendant argues, the record does not indicate that the trial court applied the law of the case doctrine as a basis for denying her motion for a new trial with respect to the issue of the prosecutor's failure to produce the photographs of Lydia Nowos and her child. The law of the case doctrine is implicated when an appellate court rules on an issue of law. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). Here, the trial court merely reaffirmed its previous decision finding no prosecutorial misconduct. We see no error in the court's decision not to revisit this issue. Further, for the reasons previously discussed, we conclude that this issue does not warrant appellate relief.

Next, defendant claims that the trial court erred in excluding evidence that the deceased offered a neighbor $1,000 to spy on the Nowos household. However, in light of the absence of any on-the-record defense request for the admission of this evidence, or ruling by the trial court, we conclude that this issue is not preserved. Thus, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *Carines*, *supra*. The evidence may have been marginally probative of the victim's potential for violence in order to establish that he was the aggressor. MRE 404; *People v Harris*, 458 Mich 310, 315; 583 NW2d 680 (1998). However, considering the circumstances of the offense itself, we are not persuaded that there is a reasonable likelihood that the outcome of trial would have been different had the evidence been received. *Carines*, *supra*.

Finally, defendant argues that the trial court erred in denying her request to certify to the Department of Corrections that the investigator's version of the offense in the presentence report did not constitute an official version of the offense. Defendant does not challenge the factual accuracy of the report, but only argues that the Department of Corrections might misuse the presentence report when considering its treatment of defendant in prison or her prospects for parole because the investigator's version of the offense suggests that defendant was guilty of first- or second-degree murder. Because the "investigator's version" of the offense is properly labeled as such, and there are no claimed inaccuracies within the report, we find no merit to this issue.

We affirm.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins