STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 6, 2002
v	No. 233149 Oakland Circuit Court
TODD WILLIAM STAYTON, Defendant-Appellant.	LC No. 2000-174977-FH

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

A jury convicted defendant Todd William Stayton of third-degree child abuse.[1] The trial court sentenced him as a fourth habitual offender[2] to fourteen months to fifteen years in prison. Stayton appeals as of right. We affirm.

I. Basic Facts And Procedural History

The prosecutor charged Stayton with third-degree child abuse for hitting his seven-year-old son with a board to discipline him for breaking beer bottles. At trial, the prosecutor asked to elicit testimony from Stayton's former wife that he had physically abused her when she was pregnant with their son. The prosecutor informed the court that the testimony was relevant to prove that Stayton had intended to injure his son. The trial court admitted the evidence, but limited Stayton's former wife's testimony to the physical abuse she suffered, not any resulting convictions against Stayton for the abuse. Stayton's former wife then testified that Stayton had abused her several times while she was eight months pregnant. In eliciting this testimony, the prosecutor was careful to ask about incidents in which Stayton had demonstrated an "intent to injure" her. The trial court instructed the jury that the evidence that Stayton had abused his wife could only be considered in terms of its relevance to proving Stayton's intent to injure his son, and could not be used to convict him because of his character. Additionally, the defense did not call any witnesses because Stayton's trial attorney failed to file a witness list with the trial court.

[1] MCL 750.136b(4). 1999 PA 273 amended this statute, and the third-degree child-abuse provision now appears at MCL 750.136b(5).

[2] MCL 769.12.

II. Other Acts Evidence

A. Standard Of Review

Stayton argues that the trial court erred in admitting the testimony that he had abused his former wife because this evidence was more prejudicial than probative. Because Stayton failed to preserve this issue for appeal by objecting at trial, our review is for plain error affecting Stayton's substantial rights.[3]

B. Admissibility

Stayton labels this evidence other acts evidence,[4] which falls under the test for admissibility articulated in *People v VanderVliet*[5] and later explained in detail by a number of other Supreme Court opinions.[6] However, the issue Stayton presents does not challenge the proper purpose and relevance of this evidence, as required under the first two prongs of the *VanderVliet* test.[7] Rather, the issue focuses on the third prong, which examines whether the evidence meets the criteria for admissibility in MRE 403.[8] MRE 403 provides in part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The key words in the balancing test this court rule articulates are "substantially outweighed" and "unfair prejudice." It is not enough that the prejudice be of the variety common to all evidence introduced in an adversarial proceeding or that the prejudice and relevance be in rough proportion to each other.[9]

This other acts evidence was not critically probative in the sense that it was the sole way to prove Stayton's intent to harm his son. There were other ways to prove Stayton intended to harm his son, such as the fact that he used an object (a board) to hit his son and the beating left bruises on the little boy that lasted two weeks. This evidence was also clearly prejudicial in that it suggested that Stayton was not a paragon of virtue but for the allegations in this case. However, the Supreme Court has held that evidence of past abuse against a former girlfriend was admissible in a subsequent trial involving a crime against a child living with the defendant.[10] That holding is easily extended to this case, in which the past abuse was against the defendant's wife and the current prosecution for violence against the defendant's child. Moreover, when preserved, the decision whether to admit this sort of evidence is discretionary.[11] Here, the

[3] See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[4] See MRE 404(b).

[5] *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

[6] See, e.g., *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000).

[7] See *VanderVliet*, *supra* at 74.

[8] *Id*.

[9] See, generally, *People v Crawford*, 458 Mich 376, 397-398; 582 NW2d 785 (1998).

[10] See *People v Hine*, __ Mich __; 650 NW2d 659, 664-665 (2002).

[11] See *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000).

prosecutor carefully limited the scope of the questions to Stayton's intent, which is listed as a proper purpose under MRE 404(b), the trial court issued appropriate limiting instructions,[12] and there was other adequate evidence of Stayton's intent to harm his son. Thus, any error was harmless, not error requiring reversal.[13]

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Stayton argues that he was denied the effective assistance of counsel because his trial attorney failed to file a witness list, which then prevented him from calling any witnesses at trial. De novo review is appropriate for this issue because it presents a constitutional question[14] and does not require us to defer to the trial court in any respect.[15]

B. Legal Standards

As this Court explained in *People v Knapp*,[16]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Because the trial court did not hold an evidentiary hearing on this issue, our review of is limited to the existing record.[17]

C. Witnesses

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[12] See *VanderVliet, supra* at 74.

[13] See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[14] See *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

[15] See, generally, *People v Toma*, 462 Mich 281, 303-305; 613 NW2d 694 (2000) (Supreme Court directly examined the evidence on the record).

[16] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[17] See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

At the outset of trial, the trial court asked the attorneys which witnesses they intended to call to testify. The prosecutor went through the names of the people he had endorsed to testify. When defense counsel indicated that the defense intended to call Brian Lee Sadler, the prosecutor noted that the defense had not filed a witness list. Defense counsel said that he "thought" he had filed a witness list, but he "could be mistaken." When defense counsel indicated that the defense could call Sadler as a rebuttal witness, the trial court responded:

> You don't have rebuttal, Counsel, and there's no – I have nothing in here [referring to a witness list]. I have – the only thing from the Defendants [sic] I have is Defendant's Answer to People's Motion to admit evidence of previous convictions under 609.
>
> There's no response to request for discovery and there's some Bench Warrants and an order setting that aside.
>
> That's the only thing that's in this file. All right. So the witnesses have been listed. . . .

Stayton now claims that Sadler, who was present in the house when he "spanked" his son, would have testified that Stayton was calm and sober at the time, suggesting that he did not intend to injure his child. He adds that other people would have testified that he was a good father, loved children, and never intended to injure children.

Whether to call witnesses is usually a trial strategy left to the attorney not subject to scrutiny with the improved perspective hindsight provides.[18] Yet, defense counsel appears to have performed below an objective standard of reasonableness in failing to file any witness list at all. He basically admitted on the record that he was negligent in failing to do so. Plainly, this was not a strategic decision. The prosecutor, on appeal, contends that this error was insufficiently prejudicial to warrant a new trial because defense counsel did not try to call Sadler to testify, his testimony was cumulative to other witness's testimony, and the trial court allowed him to call another unendorsed witness.

The trial court essentially ruled that Sadler could not testify, which means that defense counsel did not need to raise the issue again at trial.[19] Further, whether defense counsel was able to call another witness does not necessarily compensate for the absence of this witness. It is difficult to tell the extent to which Sadler's testimony would have been cumulative. However, one factor that suggests that this error was not sufficiently prejudicial to require reversal is a comment made on the record later at trial. According to defense counsel, Sadler was not in the room with Stayton and Stayton's son when the spanking occurred. While Sadler could describe Stayton's demeanor before and after the incident, he could not describe anything about the spanking itself that would have supported Stayton's claim that he did not intend to injure his son.

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[18] See *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

[19] See MRE 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

Thus, it is impossible to say that, had Sadler testified, the result in this case would have been different.[20]

As for the other witnesses that Stayton claims would have proven his good character, they likely would have been positive witnesses on his behalf. However, he admitted to the conduct underlying the charge and has not demonstrated that their knowledge of his good character in the past would suggest that he lacked an intent to injure his son, as the severity of the bruising indicated. Furthermore, defense counsel did not indicate that he would have called these witnesses but for his failure to file a witness list. Therefore, it is possible to infer that his failure to call them to testify was a matter of strategy aimed at avoiding having his character be the central issue at trial.[21]

D. Testimony

Stayton also contends that his trial attorney was ineffective for failing to call him to testify. However, the record indicates that defense counsel told the trial court that Stayton wanted to testify. The trial court engaged in a colloquy with Stayton, exploring whether Stayton had given the choice serious consideration. When Stayton indicated that his decision to testify was "spur-of-the-moment," the trial court said that it was not "comfortable" with Stayton's response, so the trial court adjourned the proceedings for lunch and told Stayton that he could take "as much time" as he needed to discuss with his attorney whether to testify. After lunch, Stayton returned to the stand and said that he did not want to testify. Accordingly, there is no support in the record for his claim that his attorney failed to call him to testify. We conclude that Stayton simply changed his mind about testifying.

E. Objection

Lastly, Stayton argues that his trial counsel was ineffective for failing to object when the prosecutor asked his former wife whether Stayton's assaults were intentional. He claims that this called for a conclusion she could not make. However, lay witnesses are allowed to give opinions.[22] His former wife's experiences and first-hand observations of the conduct she was describing allowed her to give her opinion of Stayton's intent at the time. Any objection on this basis would have been futile.[23] Thus, the attorney did not commit error, much less prejudicial error that would require us to reverse Stayton's conviction and remand for a new trial.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad

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[20] See *Stanaway*, *supra* at 687-688.

[21] See *Davis*, *supra* at 368.

[22] MRE 701.

[23] See *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).