

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE D. HARPER,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 230717

Wayne Circuit Court

LC No. 99-012336

ON REMAND

Before: White, P.J., and Kelly and Cooper, JJ.

PER CURIAM.

This case is before us for the second time, on remand from the Supreme Court. In our initial opinion,¹ we found that trial counsel's failure to file a proper notice of an alibi defense constituted ineffective assistance of counsel. We reversed defendant's convictions of second-degree murder and assault with intent to commit great bodily harm, and remanded for a new trial. *People v Harper*, unpublished opinion per curiam of the Court of Appeals (Docket No. 230717, issued 6/5/03). The prosecution appealed. In lieu of granting leave to appeal, the Supreme Court reversed, its December 11, 2003 order stating that "[d]efendant has not demonstrated a reasonable probability that, but for his trial counsel's failure to perfect an alibi defense, the result of the proceeding would have been different." The Supreme Court's order of remand instructs that we consider issues raised by defendant that were not reached in our initial opinion.² We affirm.

I

Defendant argues that counsel was ineffective in raising questions about a polygraph examination that defendant had failed, and for failing to join in objecting to references to drug dealing made by counsel for co-defendant, Keith Tate.³ We disagree.

¹ The original panel was comprised of Judges White, Kelly and Gribbs. Judge Gribbs having since retired, Judge Cooper is substituted in his stead.

² By order dated March 30, 2004, the Supreme Court denied a motion for reconsideration.

³ Tate's case was originally submitted with the instant case. This Court reversed Tate's conviction and remanded for a new trial on the basis of newly discovered evidence. *People v*
(continued...)

Trial counsel cannot be faulted for questioning the polygraph examiner regarding the polygraph given defendant's insistence that he passed the examination. The prosecution produced the polygraph examiner, who testified in rebuttal for the limited purpose of rebutting defendant's claim that he had passed the polygraph examination. The examiner testified that he did not prepare a formal report, and that his conclusions were based on his interpretation of the marks made by the polygraph machine. There was no mark on the polygraph designating truth or falsity; it was subject to the examiner's interpretation and comparison with other answers. Defendant's contention that his trial counsel could have looked at the examiner's report to determine whether he passed or failed is thus without merit. Trial counsel was given the opportunity to view the exam results, but he could not have been expected to interpret the data. Regarding the failure to object to the bad acts evidence, defendant cannot show the required prejudice. Co-defendant's counsel objected to the evidence and thus the issue was presented to the court. See *People v Bradford*, 69 Mich App 583, 586; 245 NW2d 137 (1976). Further, as discussed *infra*, the admission of the evidence does not warrant reversal. Defendant was thus not prejudiced by counsel's failure to join in the objection.

We conclude that defendant has not shown that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; defendant has not demonstrated a reasonable probability that but for counsel's errors, the result of the proceedings would have been different, *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), nor has he shown that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

II

Defendant contends that the trial court mistakenly believed it had no discretion to allow alibi witnesses since the proper notice had not been filed. He argues that the court could have ordered a continuance. Under the circumstance that the Supreme Court has determined that "defendant has not demonstrated a reasonable probability that, but for his counsel's failure to perfect an alibi defense, the result of the proceeding would have been different," i.e., that the trial court would most likely have convicted defendant even if the alibi defense had been presented, further review of this issue is precluded.

III

Defendant also argues that the prosecutor violated *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994), when he questioned witnesses about defendant's drug activities. The prosecution did not provide advance notice under MRE

(...continued)

Tate, unpublished opinion per curiam of the Court of Appeals, (Docket No. 231230, issued 6/5/03). On reconsideration, the panel clarified that a new trial must be granted if the newly discovered evidence is presented and is consistent with representations made on appeal, and that barring this, the trial court could grant or deny a new trial based on the record made at the hearing. *People v Tate*, unpublished order of the Court of Appeals (Docket No. 231230, issued 9/22/03).

404(b)(2), and the issue was raised below by objection of co-counsel. See *Bradford, supra* at 586. Nevertheless, we conclude that the court did not err in admitting the testimony because defendant injected the issue of drug activities during cross-examination of the survivor, Robert Madden. Defendant apparently was pursuing a theory that Collins and Madden were shot by others in retaliation for a shooting at another drug house. The prosecutor's follow-up questions came after defendant had injected the issue. The failure to provide notice is thus excused, and the evidence was relevant to show that the alleged motive of third parties was equally applicable to defendant.

IV

Defendant also contends that the prosecution impermissibly brought out that threats had been made against a prosecution witness, without tying the evidence to defendant. Because such evidence is viewed as being very prejudicial, it is admissible to show consciousness of guilt, but only if there is evidence that the threat "was made at the instigation of the defendant, or with his consent or approval, or at least with the knowledge or expectation that it had been or would be made." *People v Salsbury*, 134 Mich 537, 569-570; 96 NW 936 (1903); see also *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996).

Robert Madden, who was with the victim, Toriano Collins, at the time of the drive-by shooting, and was the only eyewitness to testify at trial, testified that he had heard through unnamed "girls" on the street that his life would be in danger if he testified. Madden also testified that his son was beaten in prison by unnamed persons, and that he still had concerns for his safety. When defendant objected, the prosecution argued that the evidence was being offered to show Madden's mental state when he told co-defendant's attorney in a taped conversation that the co-defendant was not involved. On cross-examination, Madden admitted that he did not know from whom the threats originated. Madden testified at trial that he at no time saw the driver of the car involved in the drive-by shooting.

Although Madden's testimony that he did not know who made the threats rendered the evidence inadmissible to show defendant's consciousness of guilt, and nevertheless allowed for an inference that it might have been defendant who made the threats, we conclude that defendant has not shown that it is more probable than not that the outcome of the trial was affected, *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). This was a bench trial and we presume that the court considered the testimony for the limited purpose offered - - to explain Madden's behavior.

V

Defendant argues that the prosecution's introduction into evidence of an assault rifle, bullets, and a bag of marijuana, without a proper foundation to tie the evidence to the killing, was reversible error and denied defendant due process. The record does not support defendant's argument. The items themselves were not offered or admitted as exhibits. In any event, because defendant did not object below, our review is for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A police evidence technician testified that a gun was found inside the doorway of the house where the shooting occurred. Unspent bullets were found in the back yard, and a small

bag of marijuana retrieved from the front porch. The items were not offered or admitted as exhibits. Defendant argues that there was no proof that any of these items were connected to him in any way, but does not explain how reference to items which the prosecution did not connect to him could constitute plain error that affected his substantial rights.

We conclude that defendant's claim fails. The unobjected to testimony regarding these items was more likely to have inured to defendant's benefit—in that it leant itself to the inference that the house where Madden and Collins were on the evening of the shooting was a drug house, that the drive-by shooting was part of drug-trade retaliation, and that the accuracy of Madden's testimony was in question, he being the sole eyewitness to testify at trial, and marijuana having been found in proximity to where he was standing on the porch at the time of the shooting. Defendant has not shown plain error that affected his substantial rights. *Carines, supra*.

VI

Defendant's final challenge is that his conviction of second-degree murder was inconsistent with his acquittal of the felony-firearm charge. Defendant maintains that when the court found that he did not possess a firearm, it was compelled to find that he did not aid in utilizing the firearm for the shooting. We disagree.

Defendant was convicted of second-degree murder, and assault with intent to commit great bodily harm under an aiding and abetting theory. The court found that defendant intended to assist in the killing when he drove to the complainants' location, turned off the car's lights, and stopped the car. After co-defendant Tate shot at Collins and Madden, defendant turned the car lights back on and drove away. The trial judge, sitting as the fact-finder in this bench trial, explained the acquittal of felony-firearm as follows:

This Court finds that the defendant Harper did not have possession of the gun and did not intentionally assist or encourage defendant Keith Tate to possess the gun, or to get it, or to keep it. Therefore, this Court finds the defendant Dale Harper not guilty of felony firearm.

Defendant's claim fails. Nothing in the trial court's statement regarding defendant's relationship to the gun precludes finding that he nevertheless aided and abetted the murder.

Affirmed.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Jessica R. Cooper