STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD KELLY,

Defendant-Appellant.

UNPUBLISHED
December 12, 2006

No. 261936
Wayne Circuit Court
LC No. 04-010768-01

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder under separate theories of premeditated murder and felony murder, MCL 750.316(1)(a) and (b). Defendant was also convicted of two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of life imprisonment for the murder conviction and concurrent terms of 50 to 75 years for each of the assault convictions, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of killing his three-year-old daughter, Stefanie Belue, and of shooting his daughter's two daycare providers, Sherita Griggs and Annette Rice. Griggs and Rice, both of whom were shot several times, each survived.

At trial, the prosecutor presented evidence that defendant reacted angrily when he learned that Stefanie's mother was pregnant. Defendant did not want her to have the child and explained that he did not want any more children. Defendant thereafter broke off his relationship with Stefanie's mother. After Stefanie was born, Stefanie's mother did not initially seek child support and defendant had very little involvement with the child. However, in April 2004, Stefanie's mother decided to seek child support from defendant. According to Stefanie's mother, defendant was opposed to paying child support and did not want the issue of child support to be handled through the courts because he believed that the recommended child support payments were too high. A court hearing on the issue of child support was scheduled for the afternoon of September 28, 2004. The instant offense was committed on the morning of September 28, 2004, at the home of Stefanie's daycare providers. The prosecutor also presented evidence that, at the time of the offense, defendant was engaged to one woman, but was seeing several other women at the same time, none of whom knew about Stefanie or another child that defendant had fathered.

I

Defendant first argues that it was improper for the prosecutor to rely on a theory that he killed Stefanie because he did not want to be burdened with the obligations of being a father or paying child support.

The prosecution's theory at trial was that defendant killed Stefanie because he did not want to be burdened with supporting another child, and also to hide from his fiancée and the other women he was seeing the fact that he had fathered another child. Defendant argues that the prosecution's theory prejudiced the jury against him and was designed to divert the jury's attention from the primary issue in the case—the identity of the shooter. We find no merit to this argument.

Because defendant did not preserve this issue with an appropriate objection at trial, appellate relief is unavailable unless defendant can show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). But prosecutorial misconduct may not be predicated on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor is entitled to introduce evidence that he or she legitimately believes will be accepted by the trial court, so long as it does not unfairly prejudice the defendant. *Id*. at 660-661.

Under the rules of evidence, all relevant evidence is generally admissible. MRE 402; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). Evidence is relevant if it tends to make the existence of a fact at issue more or less probable than it would be without the evidence. MRE 401; *Campbell*, *supra*. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but instead refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

Although defendant asserts that his displeasure with having to pay child support could be consistent with innocence, evidence of his displeasure was also relevant to show that he had a motive to kill Stefanie—namely to avoid paying child support and to avoid his obligations as a father. Proof of motive in prosecuting a murder case is generally relevant, and is probative of the intent necessary for murder as well as the perpetrator's identity. *Sabin*, *supra* at 68; *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001); *Rice*, *supra* at 440. Further, the probative value of the evidence of defendant's strong contempt toward paying child support and from assuming responsibilities as a father was high. Without this evidence, there would be no explanation for why defendant would commit such a crime. The evidence was prejudicial only because it was damaging, not because of its tendency to unfairly inject considerations extraneous

to the merits of the case. We note that *all* relevant evidence introduced by the prosecution is prejudicial to some extent; it is only *unfairly* prejudicial evidence that should be excluded. *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). Here, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Accordingly, neither the introduction of the evidence itself, nor the prosecutor's arguments that the evidence established a motive for defendant to commit the charged crimes, constituted plain error.

II

Defendant next argues that the trial court erred by failing to conduct an evidentiary hearing regarding the admissibility of the surviving victims' identifications of defendant. We disagree.

Defendant's request for an evidentiary hearing pursuant to *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), was not based on any challenge to the identification procedures that were used, but instead was based on the reliability of the victims' identifications in light of their medical conditions at the time. The right to a *Wade* hearing stems from a claim that an identification procedure is constitutionally improper. See *People v Reynolds*, 93 Mich App 516, 519-521; 286 NW2d 898 (1979). The Due Process Clause of the Fourteenth Amendment does not require a separate hearing to evaluate the admissibility of identification evidence. *Watkins v Sowders*, 449 US 341, 347; 101 S Ct 654; 66 L Ed 2d 549 (1981). Rather, an issue involving the reliability of identification testimony is a question for the jury and no special policy considerations support requiring a hearing outside the jury's presence. *Id.*; *People v Johnson*, 202 Mich App 281, 285-286; 508 NW2d 509 (1993). Because defendant did not set a forth a constitutional challenge to the admissibility of the surviving victims' pretrial identifications of defendant, the trial court did not err in denying defendant's request for an evidentiary hearing on this issue.

III

Defendant also argues that his attorney was ineffective for failing to present evidence demonstrating that the surviving victims were incompetent to identify defendant as the perpetrator due to their injuries and medical treatment. We find no merit to this argument.

Because defendant did not raise this issue of counsel's effectiveness in an appropriate motion and request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to errors apparent on the record, *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *Pickens*, *supra* at 338. The defendant must 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). To establish prejudice, the defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

As discussed in part II, *supra*, defense counsel unsuccessfully attempted to suppress the surviving victims' identifications of defendant before trial and requested an evidentiary hearing. Also as previously explained, the trial court correctly denied this request. Counsel is not ineffective for merely failing to prevail on a given issue, and the fact that a strategy does not work does not render its use ineffective assistance of counsel. See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant has not shown that counsel was ineffective in this regard.

The record also indicates that defense counsel was provided with the surviving victims' medical records before trial. At trial, counsel explored the issue of the victims' medical conditions, and the treatment they received, in an attempt to undermine the reliability of their identifications of defendant. The jury was informed of the extent of the victims' injuries and lapses of memory they experienced after being shot, as well as the medical treatment they endured. On this record, there is no support for defendant's claim that defense counsel was ineffective in his handling of this issue.

IV

Defendant next argues that the trial court erred in admitting evidence that he reacted angrily when another woman, Charity Smith, became pregnant with defendant's child, that defendant told Smith that he did not want and could not afford another child, that defendant threatened to kill Smith and her child if Smith went through with the pregnancy, that defendant became very belligerent when Smith subsequently asked defendant for support money, and that Smith suspected defendant as the person involved in an earlier incident in which Smith was shot several times. Defendant argues that this evidence was inadmissible under MRE 404(b). We review the trial court's decision to admit this evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

MRE 404(b) prohibits evidence of a defendant's other bad acts to show a defendant's bad character. The logic behind this rule is that a jury must convict a defendant on the facts of the crime charged, not because the defendant is a bad person. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). But evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is (1) offered for a proper purpose, i.e., not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In this case, the evidence was relevant to the disputed issues of defendant's intent, his identity as the perpetrator, and the existence of a motive to commit the crimes. These all constitute proper purposes under MRE 404(b). Moreover, the evidence of defendant's reaction and conduct toward Smith, and defendant's threats to kill both Smith and her child because defendant did not want and could not afford to support the child, was probative of how defendant might react when faced with the similar prospect of supporting Stefanie, another child whom defendant did not want and apparently could not afford to support.

Defendant argues that he was unfairly prejudiced by Smith's testimony because he was never charged in the shooting incident referred to by Smith. Smith testified that she received a threatening telephone call from defendant in which defendant cursed at Smith, complained about

child support, and said that he was going to "get" Smith and the child. According to Smith, she was shot seven times when someone fired a gun through her bedroom window approximately 20 minutes after the threatening telephone call. Smith did not see the shooter, but believed that defendant was responsible.

The prejudicial effect of this testimony was diminished by the trial court's cautionary instruction advising the jury that defendant was never charged with a crime involving the shooting of Smith, that the jury could consider the evidence only for the limited purpose of determining whether it showed that defendant "had a reason or motive to commit the [charged] crime and/or that [d]efendant intended to kill Stefanie Belue and/or the identity of the perpetrator," and that the jury was not to consider the evidence for any other purpose. In light of this limiting instruction, we cannot conclude that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in allowing this evidence at trial.

V

Defendant next argues that the trial court abused its discretion in admitting evidence of two books that were seized from his residence during the execution of a search warrant shortly after his arrest. One book concerned tactics that could be used to change a person's identity. The second book was entitled "Never Say Lie, How to Beat the Machines, The Interviews, The Chemical Tests." Along with the books, the police recovered a sales receipt showing that the books were purchased from a spy supply store the day after defendant was interviewed by the police. Defendant argues that this evidence was both irrelevant and unduly prejudicial. We disagree.

The prosecutor offered the evidence to show defendant's consciousness of guilt. Evidence of a defendant's flight or attempts to influence or threaten witnesses may be probative of the defendant's consciousness of guilt. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981). Other examples of evidence to prove a defendant's consciousness of guilt include conduct or statements by the defendant to conceal the commission of a crime for as long as possible. See *People v Cutchall*, 200 Mich App 396, 399-400, 404-405; 504 NW2d 666 (1993), overruled in part on other grounds *People v Edgett*, 220 Mich App 686, 691-692; 560 NW2d 360 (1997). Such evidence is generally admissible even if it is alone insufficient to support a conviction. *Sholl*, *supra*; *Coleman*, *supra*. This type of evidence is admissible where it is relevant and material, but it should be admitted with caution, particularly if the probative value is slight in light of other evidence, because the evidence can also be consistent with innocence. *Cutchall*, *supra* at 399.

In this case, the books in question provided instructions on how to conceal one's identity and how to avoid arrest or conviction. The probative value of the evidence was heightened by evidence showing that the books were purchased the day after defendant was questioned by the police, and by evidence suggesting that defendant was taking steps to flee the state before he was arrested. Under the circumstances, the trial court did not abuse its discretion in finding that the evidence was relevant to defendant's consciousness of guilt. Further, in light of the trial court's cautionary instruction advising the jury on the limited purpose of the evidence, its probative value was not substantially outweighed by the danger of unfair prejudice.

VI

In a supplemental brief, defendant argues that trial counsel was ineffective by failing to adequately prepare for trial and by failing to investigate witnesses who might have supported defendant's alibi theory. Because defendant did not raise this issue in an appropriate motion and request for an evidentiary hearing, our review is limited to errors apparent on the record. *Matuszak, supra* at 48.

An attorney's failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *McGhee*, *supra* at 626. It is counsel's duty to make an independent examination of the facts, laws, pleadings, and circumstances involved in the matter and pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004) (opinion by Kelly, J.). However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Although defendant asserts that his attorney was not adequately prepared for trial because he did not promptly move for the appointment of an investigator and then failed to cooperate with the investigator, the extent of defense counsel's trial preparation and investigation of the case is not apparent from the record. In the absence of testimony from defense counsel on these matters, there is no basis for this Court to conclude that counsel was not adequately prepared. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Furthermore, defendant's offer of proof is insufficient to support a request for an evidentiary hearing. This Court will not require a trial court to conduct a hearing regarding the effective assistance of counsel without a proper offer of proof. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

The affidavit of the defense investigator faults trial counsel for not calling Cora Ivey, Evern Charleston, and Tracey Poteat as witnesses at trial. However, both Ivey and Charleston were called by the prosecution and it appears from the record that defense counsel used information uncovered by the investigator to cross-examine both individuals. Defendant does not explain how either of these witnesses could have further aided his case. Nor does defendant explain how counsel's failure to call Poteat, the mother of another child fathered by defendant, would have furthered his defense.

The defense investigator also claimed that certain unidentified telephone records may have been altered. However, this bald, unsupported claim lacks sufficient detail and we conclude that defense counsel did not err by failing to pursue this theory. The investigator also averred that there was more necessary work to be done before trial. But again, the investigator does not provide any examples of work that he was unable to complete. Thus, we cannot rationally conclude that any further investigation would have aided defendant's case.

In sum, the existing record does not factually support defendant's claim that trial counsel was ineffective, nor has defendant demonstrated that remand for an evidentiary hearing on this issue is warranted.

VII

In a second supplemental brief, defendant argues that Evern Charleston and Cora Ivey were both coerced into giving false testimony at trial to discredit defendant's alibi defense. Defendant contends that defense counsel was ineffective for not raising this issue at trial. We disagree.

Charleston and Ivey both gave prior statements to the police that tended to support defendant's alibi defense. Specifically, both individuals told police that that defendant was working out in a gym at the time the offense was committed. At trial, however, Charleston testified that he saw someone who looked like defendant at the gym, but was not certain the person was defendant. Similarly, Ivey testified at trial that she recalled seeing defendant at the gym on the morning of the offense, but was uncertain about the time of day he arrived.

The record does not support defendant's claim on appeal that defense counsel was unaware of the witnesses' prior inconsistent statements. On the contrary, defense counsel cross-examined the witnesses about their prior statements at trial in an effort to undermine the uncertainty the witnesses expressed at trial. Moreover, there is no record support for defendant's claim that the witnesses were coerced into changing their testimony at trial. Defense counsel explored this issue with both witnesses, and both denied that they had been pressured to change their testimony or that anyone had influenced them. Although there were some inconsistencies between the witnesses' prior statements and their later testimony, trial counsel fully pursued the matter at trial. Defendant has not shown that either witness knowingly gave perjured testimony or that counsel was ineffective in this regard.

VIII

Defendant next argues that he was unduly prejudiced when the prosecutor asked three witnesses if they were aware of defendant's bankruptcy status. Because defendant did not object to this testimony at trial, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra.*

Defendant asserts that the questions were not relevant because the offense occurred in 2004, three years after he had filed for bankruptcy in 2001. We disagree. Defendant's own statements indicated that he could not afford to pay child support. Defendant's financial status was clearly an issue in this case. As discussed in part I, *supra*, the prosecutor properly relied on evidence that defendant did not want to pay child support to establish a motive for this crime. Defendant's bankruptcy status was relevant and the prosecutor's questions did not constitute outcome-determinative plain error.

IX

Next, defendant argues that the prosecutor knowingly presented false and inaccurate telephone records at trial, thereby depriving him of a fair trial. Defendant admits that he received a copy of the telephone records before trial and that he was aware of the alleged inaccuracies in the records. However, defendant did not object to the records when they were introduced at trial. We therefore conclude that this issue in unpreserved, and our review is limited to plain error affecting defendant's substantial rights.

Defendant's reliance on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), to argue a discovery violation is misplaced. As explained in *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998):

> In order to establish a *Brady* violation, a defendant must prove: (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.

There is a distinction between the failure to develop evidence and the failure to disclose evidence. *People v Vaughn*, 200 Mich App 611, 619; 505 NW2d 41 (1993), rev'd on other grounds 447 Mich 217 (1994). The police are not under a duty to seek and find exculpatory evidence, *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995), nor is a prosecutor required to perform the defendant's investigative work for him, *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

The evidence at issue in this case does not fall under the *Brady* rule because defendant admittedly was aware of the evidence and there is nothing to suggest that the prosecution suppressed it.[1] *Lester*, *supra*. Defendant admits that the telephone records were disclosed by the prosecutor well before trial. Defendant further admits that he reviewed the records before trial and advised his attorney that he believed there were some inaccuracies in the records. If defendant believed that the records were either incomplete or inaccurate, it was his duty to develop this evidence. *Traylor*, *supra* at 464. Defendant's mere assertion on appeal that he believes the records may have contained some errors is insufficient to support his claim that the prosecutor falsified this evidence.

We also reject defendant's related claim that defense counsel was ineffective in his handling of this evidence. Of the alleged inaccuracies identified by defendant on appeal, the only ones that are relevant here involve telephone calls between defendant and Lana Evans. But a comparison of the records to Evans's trial testimony fails to establish that the records were inaccurate. The record does not support defendant's claim that defense counsel was ineffective with respect to this matter.

Lastly, because defendant admits that he was aware of the telephone records before trial and had doubts about their accuracy at that time, there is no merit to his request for an evidentiary hearing on the ground that the records are newly discovered evidence. *People v Cox*, 268 Mich App 440, 450; 709 NW2d 152 (2005).

X

[1] Nor does defendant suggest that the evidence would have been favorable to him, as contemplated under *Brady*. Indeed, defendant must have realized that this evidence would be unfavorable to him.

Finally, defendant contends that he is entitled to a new trial due to the cumulative effect of multiple errors. We disagree. Only actual errors may be aggregated to determine if the cumulative effect of multiple errors deprived a defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002). Here, defendant has not established that any actual errors occurred. Therefore, he cannot establish that reversal is required under a cumulative error theory.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra