STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED November 18, 2010
v	No. 292694 Livingston Circuit Court
ROBERT LEE MURRAY, Defendant-Appellant	LC No. 08-017465-FC

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 134 months to 25 years' imprisonment, with credit for 375 days served. Defendant appeals as of right. We affirm.

On June 2, 2008, defendant had resided for two years with Barry Allmendinger in a trailer owned by Allmendinger in Livingston, Michigan. At approximately 7:20 that evening, defendant stabbed Allmendinger in the chest. The testimony about the events leading up to, and the causes of, the stabbing varied significantly at trial. According to Allmendinger, he was sitting on the couch in the trailer living room watching television when defendant came out of his bedroom and walked toward the kitchen. Allmendinger noticed that defendant "wasn't his normal self." Defendant then urinated in a coffee pot in the kitchen, placed a knife on a table behind the couch, and stood between the back of the couch and the table. Allmendinger told defendant to put away the knife to avoid hurting himself, and continued watching television. Then, without provocation, defendant pulled back on Allmendinger's hair, and stabbed him in the chest. In contrast, defendant testified that earlier in the day, he and Allmendinger had a "heated" "verbal dispute" about a topic they had previously discussed many times. Later that evening, defendant brought out three knives from inside his bedroom, and proceeded to sharpen them. He put the knives away, and approximately one hour later, he and Allmendinger engaged in a second verbal dispute regarding the same topic. Then, at Allmendinger's request, defendant retrieved two of the knives from his bedroom and put them on a table in the living room. After additional verbal exchanges, Allmendinger punched defendant in the face and continued to assault him. Defendant obtained one of the knives and stabbed Allmendinger in self-defense.

On appeal, defendant first argues that the trial court deprived him of his right to present a defense and cross-examine Allmendinger with evidence that the "verbal dispute" involved

sexually inappropriate conduct between Allmendinger and his minor daughter. Such evidence, defendant contends, was admissible under MREs 401, 402 and 404(b)(1) to show Allmendinger's bias and motive, and would have explained why Allmendinger became enraged at defendant, and that Allmendinger was the initial aggressor. "This Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). Whether the trial court denied defendant's due process right to cross-examine Allmendinger is likewise reviewed de novo. *People v Hill*, 282 Mich App 538, 540; 766 NW2d 17 (2009). However, because defendant failed to preserve this issue, we review for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

"There is no question that a criminal defendant has a state and federal constitutional right to present a defense." *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). This includes the right to cross-examine a state's witnesses to challenge their testimony and the right to present his own witnesses to establish a defense. *Id.* at 278-279 (citation omitted). This fundamental due process right is not absolute, however, and a defendant must still comport with the rules of evidence and procedure to ensure fairness and reliability throughout the trial process. *Id.* at 279; see also *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (the right to cross-examine is not unlimited and is subject to reasonable limitations). MRE 404(b)(1) governs the admissibility of other crimes, wrongs or acts:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

We summarized the four-legged test for admissibility of other-acts evidence in *People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994):

> Prior bad acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered[.]

Thus, relevant other-acts evidence violates MRE 404(b) when it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v Ortiz*, 249 Mich App 297, 304; 642 NW2d 417 (2001). This rule applies even when a defendant seeks to introduce other-acts evidence of a witness. *People v Catanzarite*, 211 Mich App 573, 579-580; 536 NW2d 570 (1995).

Here, motive and bias are valid non-propensity reasons for admitting the evidence. *People v Martzke*, 251 Mich App 282, 290; 651 NW2d 490 (2002); MRE 404(b)(1). Regarding

the second *VanderVliet* factor, we conclude that the proffered evidence was relevant. "Relevance is the relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

> [M]otive is defined by Black's Law Dictionary (rev 5th ed) as:
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> > Cause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act. *People v Lewis*, 275 NY 33; 9 NE2d 765, 768 [1937].
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> > In common usage intent and "motive" are not infrequently regarded as one and the same thing. In law there is a distinction between them. "Motive" is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. "Motive" is that which incites or stimulates a person to do an act. *People v Weiss*, 252 App Div 463; 300 NYS 249, 255 [1937]. [*People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997).]

See also *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000), quoting *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925) ("'A motive is the inducement for doing some act; it gives birth to a purpose.'"). "Bias is a common-law evidentiary term used 'to describe the relationship between a party and a witness . . . in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.'" *People v Layher*, 464 Mich 756, 762; 631 NW2d 281 (2001), quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984). Here, defendant contends that the conversation between defendant and Allmendinger regarding the sexually inappropriate conduct occurred immediately before the fight, and that the topic enraged Allmendinger, and caused him to strike defendant first. In this way, the evidence of the substance of the argument made it more probable that Allmendinger became angry at defendant for bringing up the topic, and that he hit defendant first and attacked him. *Crawford*, 458 Mich at 387. Thus, it was relevant to prove Allmendinger's motive, i.e., why Allmendinger was induced, to attack defendant, which in turn required defendant to act in self-defense. *Hoffman*, 225 Mich App at 106; *Sabin (On Remand)*, 463 Mich at 68. Moreover, defendant could argue that Allmendinger knew he struck defendant first, but that Allmendinger lied at trial and created a false version of the incident to protect himself. Thus, the substance of the conversation also made it more likely that Allmendinger was biased against defendant, or acted in self-interest, at trial.

Regarding the third *VanderVliet* factor, despite ruling that the substance of the conversation was inadmissible, the trial court stated that defendant could present evidence that Allmendinger became angry and upset after an argument with defendant, that it led to the altercation, and that as a result defendant was required to use self-defense and force against Allmendinger. This ruling allowed defendant to offer the same substantive defense that he sought without admitting evidence of the sexually inappropriate conduct with Allmendinger's daughter. It was the fact of the argument itself that was highly probative of the theory of defense. Any evidence of the substance of the conversation between defendant and Allmendinger was only marginally, additionally probative of the facts defendant ultimately

sought to prove. However, the substance was highly prejudicial because it painted Allmendinger as a pervert with a history of sexually inappropriate behavior with his minor daughter. Such evidence would have distracted or biased the jury against Allmendinger, thus injecting extraneous considerations into the merits of the trial. *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). There would have been a serious danger that "marginally probative evidence [would] be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. Accordingly, the evidence violates MRE 403, and does not satisfy the third *VanderVliet* factor. Defendant was not deprived of his right to present a defense or cross-examine on these grounds. *Hayes*, 421 Mich at 279; *Adamski*, 198 Mich App at 138. Plain error requiring reversal did not occur. *Carines*, 460 Mich at 763.

Next, defendant argues that his trial counsel was ineffective for failing to object when an investigating officer, Trooper Christopher Corriveau of the Michigan State Police, testified that defendant changed his story during an interview immediately after the incident. Corriveau further stated that witnesses who change their stories are untruthful, which, defendant contends, was tantamount to testifying that defendant was untruthful. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant did not obtain an evidentiary hearing, our review is limited to the mistakes apparent in the trial record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000) (citation omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, defendant must show that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Here, assuming Corriveau's testimony amounted to an improper opinion of defendant's credibility, see *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007), defendant has not proved that counsel's decision not to object fell below an objective standard of reasonableness. Counsel is presumed effective, *Solmonson*, 261 Mich App at 263, and the failure to object was reasonable trial strategy. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995) ("[T]here are times when it is better not to object and draw attention to an improper comment.") Nevertheless, even if it was unreasonable for counsel not to object, the error did not affect the outcome of trial. The challenged testimony indirectly commented on defendant's credibility and was isolated. Moreover, the trial court explicitly instructed the jury that police officers are "to be judged by the same standards you use to evaluate testimony of any other witness." It issued several other instructions that it was the jury's responsibility to assess the credibility of the witnesses and decide what testimony to believe. Jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, as the jury presumably assessed defendant's credibility based on the numerous instructions regarding witness credibility, and not the brief and indirect statement by Corriveau, defendant has failed to show that the outcome of trial would have been different but for counsel's failure to object.

Finally, defendant argues that he is entitled to a new trial because the prosecutor violated *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by failing to disclose

evidence that one of the investigating officers who testified at trial, Trooper Todd Parsons of the Michigan State Police, was previously convicted of making a false police report of a misdemeanor, MCL 750.411a(1)(a). Parsons testified, in part, that Allmendinger's injuries were consistent with his version of events, which, defendant contends, encouraged the jury to accept Allmendinger's testimony and reject defendant's claim of self-defense. Defendant contends that evidence of Parsons's conviction would have allowed defendant to impeach Parsons's credibility at trial and lessen the impact his testimony had in swaying the jury to believe Allmendinger, which would have resulted in an acquittal. "This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 US at 87; see also *People v Fink*, 456 Mich 449, 453-454; 574 NW2d 28 (1998). "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998), citing *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

> 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. [*Lester*, 232 Mich App at 281.]

Here, the parties agree that the first three elements are met, and that the only issue is whether defendant has satisfied the fourth element.

> The failure to disclose impeachment evidence does not require automatic reversal, even where, as in the present situation, the prosecution's case depends largely on the credibility of a particular witness.
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> A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Bagley*, [473 Mich at 682]. Accordingly, undisclosed evidence will be deemed material only if 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)]. In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. *Bagley* [473 Mich at 683]. [*Lester*, 232 Mich App at 281-282.]

Here, Dr. Chet Morrison, a trauma and critical care surgeon at Sparrow Hospital, and the attending physician who reviewed Allmendinger's medical records the day after he arrived in the

hospital, testified to the extent of Allmendinger's injuries. He further testified that Allmendinger's injuries were consistent with being stabbed, and specifically that they were consistent with Allmendinger's version of the incident. Thus, even if defendant had been able to impeach Parsons' credibility with evidence of his criminal conviction, the evidence would not have affected Dr. Morrison's testimony, and the jury still would have heard testimony that Allmendinger's wounds were consistent with his version of the facts. Moreover, as stated previously, the jury presumably followed the numerous instructions regarding witness credibility. *Graves*, 458 Mich at 486. Thus, we conclude that defendant has not shown that the evidence of Parsons' conviction was so significant that it would have put the entire case in such a new light that it undermined the confidence in the jury verdict. *Lester*, 232 Mich App at 281-282. Accordingly, defendant has not satisfied the fourth element to establishing a violation of *Brady*, 373 US at 87.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad