STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2011
v	No. 299897 Muskegon Circuit Court
JEFFREY ALLEN HEPLER, Defendant-Appellant.	09-058712-FH

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Defendant Jeffrey Allen Hepler was convicted by a jury of making a false report of a felony, MCL 750.411a(1)(b), operating a motor vehicle while intoxicated (OWI), MCL 257.625(1)(a), and failing to report an accident, MCL 257.622; MCL 257.901. The trial court sentenced him to three, concurrent terms of 30 days in jail, 15 months' probation, and 40 hours' community service, plus payment of fines and costs. Defendant appeals as of right his conviction for falsely reporting a felony and the costs listed on his judgment of sentence. We affirm defendant's convictions and sentence, and remand for amendment of his judgment of sentence.

I. FACTUAL BACKGROUND

In the early morning hours of August 13, 2009, defendant crashed his motorcycle on Whitehall Road in Muskegon County. A passerby saw the motorcycle on the shoulder of the road, stopped, and called 9-1-1, but could not locate the driver. Michigan State Police Trooper David Brunsting and his partner were dispatched to the scene at 2:19 a.m. Trooper Brunsting testified that the motorcycle was heavily damaged on both sides, which suggested that the driver may have been injured. They were unable to locate the driver, but found several pieces of identification linking defendant to the motorcycle and learned that the motorcycle was registered to defendant. The troopers went to defendant's house, but no one answered the door.

Defendant's daughter, Tara Middlecamp, testified that she lived with defendant and was awakened at about 1:30 or 2:00 a.m. on August 13 when defendant knocked on her bedroom window. He was holding his side and moaning in pain. Middlecamp drove defendant to his in-law's house where his wife was staying. According to defendant's father-in-law, David Wilks, defendant said that he had wiped out on his motorcycle after hitting some gravel on the edge of

the road. Later that morning, when defendant and his wife left the house, Wilks assumed that they were going to the hospital to seek treatment for defendant's injuries.

Muskegon County Sheriff Dean Roesler received a call on his cell phone from defendant at 10:00 or 10:30 that morning. The sheriff was familiar with defendant from the community and because defendant was "a fellow elected official."[1] Defendant said that the night before, he was at the Canary Inn in North Muskegon, got a ride home because he had been drinking, and left his motorcycle in the Inn's parking lot. When he returned to the Inn that morning, however, his motorcycle was missing. He feared that someone had stolen it and asked if the sheriff could have someone meet him at the Inn and make a report. Sheriff Roesler told defendant that he would have a North Muskegon Police car go to the parking lot because the Inn was located in North Muskegon. The sheriff then called central dispatch and requested that a North Muskegon car be sent to the Inn's parking lot "to meet with the subject on a stolen motorcycle complaint."

After calling central dispatch, Sheriff Roesler drove to the Inn. Defendant and his wife were in the parking lot. Defendant again told the sheriff that he had left his motorcycle in the parking lot the night before and that it was now missing. Sheriff Roesler noticed that defendant was hurt, and defendant explained that he had fallen down a flight of stairs the night before, twisting his ankle and banging his ribs. When North Muskegon Police Officer Todd Friend arrived at the Inn's parking lot, the sheriff introduced him to defendant. He also told Officer Friend that defendant believed his motorcycle had been stolen and that because the incident allegedly occurred in North Muskegon, he would let that city's police department handle it.

When Sheriff Roesler got into his car to leave, he received a cell phone call from his brother, Lieutenant Dave Roesler, the state police post commander for the Grand Haven post. Lieutenant Roesler asked if the sheriff "had requested a North Muskegon car to go meet a guy at [the] Canary Inn for a stolen motorcycle report." When the sheriff said that he had and that "the guy" was defendant, the lieutenant said not to let defendant leave because state police troopers had found his motorcycle early that morning, they had not been able to locate defendant, and two detectives were now on their way to the parking lot. Sheriff Roesler responded: "[T]hat kind of makes sense because [defendant's] complaining of some injuries which I believe were now consistent with a motorcycle crash." He ended the phone conversation, got out of his car, and spoke with defendant. Sheriff Roesler further testified:

> [I] told [defendant] that I now know where his motorcycle is and what actually probably happened and that he needed to be truthful about the events and he was in the process, from what I could see, of talking to the North Muskegon Officer and I said, you need to be truthful about the events and is this the, you know is this the story you want to stay with, or I said, this isn't what happened is it and he kind of dropped his head and shook his head no and I said, just be truthful.

At that point, Sheriff Roesler noticed that defendant's breathing had become more difficult, he was sweating, and he looked pale. The sheriff called an ambulance and then rode

[1] At the time of this incident, defendant was the elected county drain commissioner.

with defendant in the ambulance to the hospital. Just before the ambulance left the Inn's parking lot, however, two state police detectives, Gary Miles and Joseph Gasper, arrived and walked toward the ambulance. Sheriff Roesler told the detectives that defendant had called him and reported his motorcycle stolen, but that he (the sheriff) now knew what had really happened. The detectives agreed to interview defendant at the hospital after he had been treated.

Officer Friend, of the North Muskegon Police, testified that he was dispatched to the Inn at 10:28 a.m. on a stolen vehicle complaint.[2] Defendant told him that he had been drinking at the Inn the night before, got a ride home, and left his motorcycle in the parking lot. When he came back for the motorcycle, it was gone. Defendant said that he wanted to make a complaint that his motorcycle had been stolen. During their conversation, Sheriff Roesler got into his car and started driving, but before exiting the parking lot, got back out of his car and approached defendant. When the sheriff asked defendant if he wanted to change his story, defendant "kind of sighed and dropped his head and apologized and said yes he did, was involved in an accident on his motorcycle last night." He "apologized for saying his bike was stolen." Officer Friend then noticed that defendant was injured. The officer believed that defendant had been fighting to hide that he was injured until that point.

Detective Sergeant Miles, of the Michigan State Police, testified that he was assigned to investigate the crash of defendant's motorcycle at about 9:30 that morning. While searching for defendant, he heard Sheriff Roesler's radio request regarding a stolen motorcycle. After speaking with Lieutenant Roesler about the request, he and Detective Sergeant Gasper drove to the Inn. While on route, the state police post informed them that defendant was the person at the Inn and was requesting an ambulance for injuries from a traffic crash. When the detectives arrived at the Inn's parking lot, they noticed defendant's injuries and, when asked, he said that he sustained the injuries in a traffic crash. Defendant was then transported to the hospital, where he was interviewed by the detectives. Defendant admitted to drinking and crashing his motorcycle the night before. He was not asked whether he had falsely reported his motorcycle as stolen.

II. DEFENDANT'S CONVICTION FOR FALSELY REPORTING A FELONY

On appeal, defendant argues that the trial court erred by granting the prosecution's motion to quash his subpoena for Muskegon County Prosecutor Tony Tague and motion in limine to limit defense counsel's cross-examination of the prosecution's witnesses. We disagree.

At the preliminary examination, Officer Friend testified that although the incident at issue occurred on August 13, 2009, he did not prepare a police report of the incident until September 9, 2009, when the prosecutor's office requested that he do so. Tague called him and asked him to prepare a report. Although he had sufficient information to file a police report regarding defendant's false report of a felony, the officer did not do so because he "was not going to pursue charges on [defendant]," meaning a false police report charge. When the trial court asked Officer Friend why he had not intended to pursue a charge, he replied: "Cause I was talking to

[2] Officer Friend initially testified out of the presence of the jury. The portion of his testimony that is summarized here, however, was given in the jury's presence.

Sheriff Roesler when we were there and kind of got the not to do it." The officer explained that he generally would not file a police report if he did not intend to pursue charges.

After the preliminary examination, defendant filed a witness list, which listed Tague. The prosecution requested that defendant strike Tague from the list. Defense counsel responded with a letter to the assistant prosecutor, stating: "I do not intend on striking Tony Tague from my witness list. He is a witness in the felony Filing a False Police Report case. MRPC 3.7 should be reviewed by your office along with People v Doyle, 159 Mich App 632 (1987)." Thereafter, the prosecution filed a motion to quash defendant's subpoena for Tague and motion in limine to preclude defendant from "unlawful and manipulative questioning of prosecutorial power." Defendant argued that he should be permitted to question Tague about his interference in the investigation of this case, particularly by instructing Officer Friend to file a police report and possibly instructing Sheriff Roesler to do the same, and to inquire into any bias Tague might have against defendant. Defendant further asserted that Tague and the entire Muskegon County Prosecutor's office should be disqualified from prosecuting the case. On April 26, 2010, the day before the trial commenced, the trial court entered an order granting the prosecution's motion to quash and motion in limine to preclude defense. The court listed two reasons for its decision to quash the subpoena for Tague: 1) Tague had no relevant evidence to offer; and 2) prosecutorial discretion.

On the first day of trial, the prosecution filed a motion in limine to preclude defendant from introducing evidence suggesting that any law enforcement officer was disinclined to prosecute this case or felt pressured to do so because such evidence was irrelevant and unfairly prejudicial. The trial court granted the prosecution's motion. It held that defense counsel could ask any of the witnesses whether they felt pressured to testify in a certain way. The court also permitted defense counsel to introduce evidence regarding the dates of the officers' police reports, only because the dates could be relevant to how good the officers' memories were by the time the reports were prepared. But counsel was not permitted to present evidence regarding the reason for the dates of the reports, other than evidence suggesting that there were administrative reasons for any time delays. The trial court subsequently entered a written order granting the motion in limine regarding "disinclination" testimony.

On appeal, defendant argues that the trial court erred in granting the prosecution's motion to quash defendant's subpoena for Tague and motion in limine to exclude all "disinclination" testimony. Specifically, defendant argues that the court's decisions infringed on his constitutional right to compulsory process and, therefore, that his conviction for making a false report of a felony should be vacated. Generally, a trial court's decision to quash a subpoena, preclude a prosecutor from testifying, or limit cross-examination is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002); *People v Ulecki*, 152 Mich App 801, 809; 394 NW2d 114 (1986). A preserved nonconstitutional error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the asserted error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). But to the extent defendant claims the trial court infringed on his constitutional right to compulsory process, this issue is unpreserved. Defendant did not raise such a claim of constitutional error before the trial court. We review unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *People v Carines*,

460 Mich 750, 763-764; 597 NW2d 130 (1999). Under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, and 3) the error was outcome determinative. *Id*. at 763. Reversal is only warranted when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id*.

A criminal defendant has the right to compulsory process for obtaining witnesses in his favor. *People v Loyer*, 169 Mich App 105, 112; 425 NW2d 714 (1988), citing US Const, Am VI.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." [*People v Merritt*, 396 Mich 67, 81 n 16; 238 NW2d 31 (1976), quoting *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).]

This right to compulsory process "is applicable to the states through the Fourteenth Amendment." *Loyer*, 169 Mich App at 112, citing *Washington*, 388 US at 17-18. The Michigan Constitution similarly guarantees a criminal defendant the right to compulsory process of witnesses in his favor. *Id*., citing Const 1963, art 1, § 20. "However, a criminal defendant's right to compulsory process is not absolute, and the constitution does not grant the right to subpoena any and all witnesses a party might wish to call." *Id*. at 112-113. The right depends on a demonstration that the proposed witness' testimony would be material and favorable to the defense, and it must be balanced against the state's legitimate interests in the fair and efficient administration of justice, and the integrity of the adversarial process. *People v McFall*, 224 Mich App 403, 408, 410; 569 NW2d 828 (1997). Black's Law Dictionary defines "material" as "[h]aving some logical connection with the consequential facts[.]" Black's Law Dictionary (8th ed), p 998; see also *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995) (defining "materiality" under MRE 401).

Defendant first argues that the trial court improperly granted the prosecution's motion to quash his subpoena for Tague. In opposing the motion, defendant asserted that Tague and the entire Muskegon County Prosecutor's office should be disqualified from prosecuting the case. "A defendant seeking to disqualify a prosecutor as a necessary witness bears the burden of proof." *People v Petri*, 279 Mich App 407, 417; 760 NW2d 882 (2008). The Michigan Rules of Professional Conduct prohibit attorneys from acting as advocates at trials where they are likely to be necessary witnesses, except where the testimony relates to an uncontested issue or the nature and value of legal services rendered in the case, or where disqualification of the attorney would work substantial hardship on the client. MRPC 3.7(a). This Court has held that a "prosecutor is not a necessary witness if the substance of the testimony can be elicited from other witnesses, and the party seeking disqualification did not previously state an intent to call the prosecutor as a witness." *Petri*, 279 Mich App at 417.

We hold that Tague was not a necessary witness under MRPC 3.7(a) and that the trial court did not err in granting the motion to quash. First, the prosecution argues that the substance of Tague's proffered testimony could have been elicited from other witnesses. As the prosecution points out, the fact that Tague asked Officer Friend to file a police report regarding defendant's alleged false report of a felony almost one month after the incident was undisputed, and Officer Friend could have testified to that fact, assuming such evidence was admissible. But defendant argues that he should also have been permitted to question Tague about any bias he might have had against him. According to defendant, Tague's request for a police report, and ultimately bringing a false report charge against him, was motivated by bias. Defendant is correct that evidence of bias is almost always relevant. *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001). But a trial court has wide discretion regarding the admissibility of evidence of bias. *Id*. at 765. It was proper for the trial court to weigh defendant's right to question Tague about possible bias against the principle of prosecutorial discretion in bringing criminal charges.

> "The county prosecutor is a constitutional officer with discretion to decide whether to initiate criminal charges." *People v Herrick*, 216 Mich App 594, 598; 550 NW2d 541 (1996). In so doing, the prosecutor is carrying out an essential executive branch function. "The principle of separation of powers restricts judicial interference with a prosecutor's exercise of executive discretion." *Id*.; see, generally, Const 1963, art 3, § 2. Judicial review is appropriate only where prosecutorial decisions are "unconstitutional, illegal, or ultra vires or where the prosecutor has abused the power confided in him." *People v Jackson*, 192 Mich App 10, 15; 480 NW2d 283 (1991) (citations omitted). Absent any such challenge (which may require examination of the prosecutor's thought processes), e.g., an equal protection claim alleging racially biased prosecutions, the ability of the prosecutor to effectively carry out his constitutional responsibilities is undermined when the courts obtain access to documents such as the disposition record. [*People v Gilmore*, 222 Mich App 442, 457-458; 564 NW2d 158 (1997).]
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> "Courts are 'properly hesitant to examine the decision whether to prosecute.' . . . It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. 'Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.'" [*Id*. at 458 n 12, quoting *United States v Armstrong*, 517 US 456, 465; 116 S Ct 1480; 134 L Ed 2d 687 (1996) (citations omitted).]

Here, Tague exercised his executive discretion in bringing the false report charge against defendant, and defendant has not alleged that Tague acted outside his authority in requesting Officer Friend to file a police report. Defendant has not specifically claimed that any of Tague's actions were unconstitutional, illegal, or ultra vires. He has only alleged that Tague might have had some bias against him. Absent a specific challenge to the propriety of Tague's actions, permitting defense counsel to question Tague about his motivation for pursuing a charge against

defendant would have unnecessarily interfered with Tague's prosecutorial discretion. The trial court did not err in granting the prosecution's motion to quash.

Defendant further argues that the trial court improperly granted the prosecution's motion in limine to limit defense counsel's cross-examination of the prosecution's witnesses, specifically regarding any police officer's "disinclination" to prosecute defendant. In regard to Officer Friend, the court held that defense counsel could not "inquire about the officer's opinion about the strength of the case" or "behavior which bears on that issue," including the "officer's decision not to file a report," his "conversation with the prosecutor later,"' and the "reasons why he filed a report on September 9." A witness may be cross-examined on any matter relevant to any issue in the case, *People v Federico*, 146 Mich App 776, 793; 381 NW2d 819 (1985), but a criminal defendant does not have an unlimited right to admit all relevant evidence or cross-examine on any subject. See *Loyer*, 169 Mich App at 112-113 (stating that the right to compulsory process is not absolute); see also *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). The "accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Yost*, 278 Mich App at 379 (quotation marks and citations omitted).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. But even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" MRE 403. "[U]nfair prejudice 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." *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) (citation omitted).

Defendant sought to question Officer Friend and possibly Sheriff Roesler about their initial disinclination to pursue a false report charge against him and if they later felt pressured to do so. Such evidence would have been only marginally relevant, at best, and any probative value such evidence may have had was substantially outweighed by the danger of unfair prejudice and confusing or misleading the jury. If the trial court permitted Officer Friend to testify that he did not intend to pursue a charge against defendant and only filed a police report because of Tague's request that he do so, the court would have come dangerously close to interfering with Tague's prosecutorial discretion to file criminal charges, as discussed above. On the other hand, permitting Officer Friend and possibly Sheriff Roesler to testify that they did not intend to pursue a charge, without further explanation as to their reasoning, might have lead the jury to believe that the officers did not think defendant was guilty of the offense. A witness' opinion concerning the guilt or innocence of a criminal defendant is not admissible. *People v Moreno*, 112 Mich App 631, 635; 317 NW2d 201 (1981). Moreover, defendant has not explained how the officers' personal opinions about whether to pursue a charge against him early in the investigative process, regardless of their reasoning, had any bearing on his actual culpability. Considering the danger of unfair prejudice and confusing or misleading the jury posed by the proffered testimony, the trial court did not err in limiting defense counsel's cross-examination.

We additionally hold that even if defendant could establish that the trial court erred in granting the prosecution's motions, he cannot establish outcome-determinative error. See *Carines*, 460 Mich at 763-764 (holding that to avoid forfeiture of an unpreserved, constitutional error, the error must have affected the outcome of the lower court proceedings); *Lukity*, 460 Mich at 495-496 (holding that preserved nonconstitutional error is only grounds for reversal if it is more probable than not that the asserted error was outcome determinative). The elements of the crime of falsely reporting a felony are that the defendant (1) made a false report of a felony, and (2) intended to do so. MCL 750.411a(1)(b). A defendant's act of making a false report of a felony to a police officer with knowledge that the report is false is sufficient to violate the statute. See *People v Lay*, 336 Mich 77, 82; 57 NW2d 453 (1953).

The prosecution presented testimony from more than one witness that defendant told the police that his motorcycle was stolen, knowing that his report was false. Sheriff Roesler testified that he received a call on his cell phone from defendant. Defendant told the sheriff that his motorcycle was missing from the Inn's parking lot and he feared it had been stolen. The sheriff then called central dispatch and requested that a North Muskegon car be sent to the parking lot "to meet with the subject on a stolen motorcycle complaint." A tape recording of the call was admitted at trial and played for the jury. When Sheriff Roesler arrived at the Inn, defendant repeated that he had left his motorcycle in the parking lot and it was now missing. Officer Friend testified that when he arrived, defendant explained that his motorcycle was missing and that he wished to make a stolen vehicle report. Further, according to both Sheriff Roesler and Officer Friend, when defendant was confronted with the fact that the state police had located his crashed motorcycle, he dropped his head and indicated that he wished to change his story. Officer Friend testified that defendant said he was sorry for reporting the motorcycle as stolen. Detective Sergeants Miles and Gasper both testified that they went to the Inn because of hearing Sheriff Roesler's radio message regarding the stolen motorcycle report. Detective Sergeant Miles further testified that when he later interviewed Wilks, Wilks stated at least once that defendant admitted to making the false report about his motorcycle.[3] This evidence was more than sufficient for the jury to find defendant guilty of falsely reporting a felony under MCL 750.411a(1)(b). Even if the trial court had permitted defendant to present evidence regarding the police officers' initial disinclination to prosecute defendant and Tague's request that a police report be filed, defendant cannot establish that such evidence would have, more probably than not, led to his acquittal on the false report charge. Therefore, reversal would not be warranted.

III. DEFENDANT'S JUDGMENT OF SENTENCE

Defendant argues that his judgment of sentence does not reflect the costs actually imposed by the trial court and should be amended. We agree.

[3] Detective Sergeant Miles interviewed Wilks one week before the trial commenced. During that interview, Wilks admitted that within days after the motorcycle crash, defendant told him about falsely reporting his motorcycle as stolen, although Wilks later said, during the same interview, that defendant had not admitted that. During his trial testimony, Wilks said that he could not recall what he had said during the interview in regard to defendant's alleged false report.

Because this issue was not raised below, our review is for plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763.

At sentencing, the trial court imposed monetary sanctions, stating:

> "Fines and costs, $169 state cost, $60 Crime Victims Rights Fund, a fine of $500, at least to compensate for some of these expenses . . . , oversight fees of $40 a month [$40 per month for 15 months' probation, totaling $600]. . . $450 then for the reimbursement to the Prosecutor for the operating while intoxication [sic] prosecution."

The sanctions totaled $1,779. The judgment of sentence, however, lists state costs of $204, rather than the $169 imposed at sentencing, and circuit court costs, which were not imposed at sentencing, of $500. The judgment of sentence lists sanctions totaling $2,314. The prosecution acknowledges this discrepancy.

A sentencing court may only require a criminal defendant to pay costs when such a requirement is authorized by statute. *People v Nance*, 214 Mich App 257, 258-259; 542 NW2d 358 (1995). The trial court properly imposed state costs of $169 pursuant to MCL 769.1j(1)(a)-(c), (7); MCL 780.901, rather than the $204 listed in the judgment of sentence.[4] There is also no statutory authority for the $500 in circuit court costs listed in the judgment of sentence. Accordingly, we hold that the state costs and circuit court costs listed in the judgment of sentence are in error. As defendant requests and the prosecution agrees, we remand for amendment of the judgment of sentence to reflect the monetary sanctions imposed by the trial court at sentencing.

We affirm defendant's convictions and sentence, and remand for amendment of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[4] The prosecution sates in its brief on appeal: "The trial court correctly stated [at sentencing] the amount owing for state costs of $169.00 based upon the felony ($68.00), serious misdemeanor (OWI) ($53.00), and nonserious misdemeanor ($48.00)."