STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2012
v	No. 301284 Midland Circuit Court
CODY DOUGLAS NELSON, Defendant-Appellant.	LC No. 10-004394-FC

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of first-degree premeditated murder, MCL 750.316(1)(a). Defendant was sentenced to life imprisonment without the possibility of parole. We affirm.

This case involves a particularly violent murder. The victim and defendant had been dating for approximately three years. On December 9, 2010, defendant was seen in the lobby of Midland Hospital. He told the hospital employee who assisted him that his girlfriend had been stabbed to death and he knew who had committed the murder. Police officers found the victim in her apartment covered in a blanket and a towel. The victim had been stabbed several times, including having her heart perforated three times and her sternum twice. Two knives had been left in other parts of her body.

On appeal, defendant argues that trial court erred when it allowed an expert witness, State Police Crime Lab biologist Jodi Corsi, to testify about blood spatter observations and to provide the opinion that the spattering indicated that defendant was present when the murder occurred. Defendant argues that the substance of this proposed testimony was not properly disclosed under MCR 6.201(A)(3). A trial court's decision regarding discovery in a criminal proceeding is reviewed on appeal for an abuse of discretion, MCR 6.201(J); *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994), as is a court's decision to admit or exclude evidence, *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). A trial court abuses its discretion when it renders a decision that "falls outside the range of principled outcomes." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Whether a rule of evidence precludes the admission of the evidence is a question of law that is reviewed de novo. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

Resolution of this issue is governed by MCR 6.201(A)(3), which provides that a party must provide upon request "the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion."[1] Here, although Corsi testified that blood spattering on a pair of jeans found in a bedroom in the victim's apartment indicated that the jeans had to be present when the murder occurred, defendant admitted receiving copies of the expert's curriculum vitae and laboratory reports. The curriculum vitae includes references to training in bloodstain pattern analysis, and one of the reports includes numerous references to bloodstains found at the scene. Though the reports do not contain explicit statements similar to Corsi's blood spatter testimony, they were certainly specific enough to comply with the court rule.

In essence, defendant is arguing that the requirement that "a written description of the substance of . . . the expert's opinion" be provided as part of a report. This argument is inconsistent with the structure of the subrule. The subrule clearly provides for an "either-or" choice, and the requirement that the substance of the opinion be provided is as an alternative to a report. See *People v Yost*, 483 Mich 856, 857-858 n 1; 759 NW2d 196 (MARKMAN, J., concurring). Indeed, following the logic of defendant's argument, all of the requirements of the alternative would be incorporated into the report requirements, thereby dictating the contents of an acceptable report. There is nothing in the history or language of the rule that indicates this was the intent of the drafters. The court did not err in allowing the expert to testify about the blood spatter on the jeans.[2]

In any event, even if the trial court did err by allowing this specific testimony, because Corsi's testimony was inculpatory, rather than exculpatory, the decision is subject to harmless error analysis. *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000). And, the admission of the testimony was harmless, as other evidence pointed to defendant's guilt. For example, the jury was presented with defendant's repeatedly changing story about when and how he found the victim, where she currently was, and who could have committed the crime. Cell phone and computer records showed that defendant was not where he claimed to be at the time of the murder, and the victim's blood was found on him. Other evidence, much of it circumstantial, supported the jury's verdict, and any error in the admission of the challenged evidence was harmless.

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[1] "The interpretation of a court rule is governed by the principles of statutory construction. The goal of court-rule interpretation is to give effect to the intent of the Supreme Court, the author of the rules. We begin with the language of the court rule. If the language is clear and unambiguous, further interpretation is neither required nor permitted; the rule must be enforced as written. We may not read into an unambiguous court rule a provision not included by the Supreme Court." *People v Swain*, 288 Mich App 609, 629; 794 NW2d 92 (2010) (citations omitted).

[2] We also note that defendant had an opportunity to meet with Corsi between her direct examination testimony and the start of cross-examination, which occurred on separate days.

Next, defendant argues that he was denied the effective assistance of counsel. On de novo review, we are limited to the facts on the record because defendant did not move for a new trial or an evidentiary hearing before the trial court. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To establish ineffective assistance of counsel, defendant bears the heavy burden of showing that trial "counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Counsel is afforded broad discretion in the handling of cases. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995) vacated in part on other grounds 453 Mich 902 (1996).

Defendant contends that defense counsel was ineffective for failing to rebut the blood spatter analysis with expert testimony or a suitable explanation. However, defendant does not provide an affidavit or make an offer of proof to establish what this evidence would be, which he must do to support his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Furthermore, defendant has not shown that defense counsel's decisions on how to handle the blood spatter testimony were unsound. Defense counsel elicited during cross-examination that the blood stains were not the result of arterial spurting and that the impact spatter observed could have been caused by a hand slamming down on a pool of blood. This information was then used to discredit the prosecutor's theory that defendant was wearing those clothes when he murdered his girlfriend. Choosing this tactic was not a result of an ineffective attorney.

Finally, we reject defendant's assertion that the trial court abused its discretion when it allowed the introduction of graphic photographs of the victim. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

"Photographic evidence is admissible if relevant, pertinent, competent, and material to *any* issue in the case." *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991) (Emphasis in the original.). However, relevant evidence can be excluded under MRE 403 if the evidence's probative value is substantially outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) mod 450 Mich 1212 (1995). Photographs do not have to be excluded simply because they are gruesome or similar evidence can be introduced through a witness' oral testimony. *Id*. at 76. "The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Id*. When determining this, "the trial court should balance the concern claimed by the defendant that exposure to vivid and gruesome images of the victim will cause a juror to forget that the

defendant may not be responsible for the outrage against the need to arrive at the truth of how and at whose hands the victim died." *People v McCord*, 167 Mich App 365, 369; 421 NW2d 692 (1988).

The extent and nature of the wounds in the case are relevant to more than how the victim died. The wounds illustrate the personal nature of the attack that continued even after the victim was dead. Thus, they are highly probative to show defendant's state of mind. While the photographs are undeniably graphic, they were not unfairly prejudicial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray