STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 1997
v	No. 180111 Kent Circuit Court
GREGORY WINES, Defendant-Appellant.	LC No. 93-64278-FC AFTER REMAND

Before: Fitzgerald, P.J., and O'Connell and T.L. Ludington*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, kidnapping, MCL 750.349; MSA 28.424(2), and first-degree felony murder. MCL 750.316; MSA 28.548. He was sentenced to concurrent life sentences for each conviction with the additional condition that the felony murder sentence be served without possibility of parole. He now appeals as of right, and we affirm.

As set forth in the related case of *People v Launsburry*, 217 Mich App 358, 360; 551 NW2d 460 (1996),

> On November 23, 1993, [Steven Launsburry] and [the present defendant], intending to steal a vehicle in order to leave town, flagged down the victim's car. The victim was an expectant mother who was the lone occupant of the vehicle. After the victim stopped, [Launsburry] got into the passenger side of the vehicle. [Defendant] sat directly behind the victim. [Launsburry] pulled a .22 caliber revolver from his waistband and told the victim to follow his directions. After traveling for a time, [Launsburry] told the victim to pull over and stop the vehicle. [Launsburry] ordered the victim out of the car. While [defendant] remained in the vehicle, [Launsburry] walked the victim toward a factory building.

* Circuit judge, sitting on the Court of Appeals by assignment.

Launsburry then shot the victim twice in the back of the head and returned to the automobile.[1] Defendant asked, "What happened?" Launsburry replied, "It was quick and painless."

The two then picked up defendant's girlfriend and the three began driving to Mexico. They stopped at a motel in Illinois, and while Launsburry slept, defendant and his girlfriend called the police. Defendant, agitated and remorseful, confessed his involvement in the affair. He led the police to the room where Launsburry slept, and advised them that Launsburry was armed and would not be taken alive. After a short struggle during which Launsburry attempted to retrieve his firearm, Launsburry was apprehended.

While Launsburry had told defendant that the victim's death had been quick and painless, it was not. Police found the victim at approximately 9:00 a.m. the following morning. When the police officer approached her prostrate form, she raised her hand, signaling for help. She died several days later in the hospital. Defendant was subsequently convicted of the crimes set forth above.

I

On appeal, defendant first argues that he was denied his right to due process where the prosecution violated a discovery order in failing to disclose a plea bargain agreement given a prosecution witness in exchange for his testimony and where that witness expressly denied receiving a plea bargain agreement. This Court, on its own motion, remanded to the circuit court for an evidentiary hearing to determine whether this, in fact, occurred. Our review of the transcript of the hearing indicates that defendant's allegations are accurate. However, while we do not condone the actions of the prosecution in this case, we are constrained to conclude that, in light of defendant's testimony at trial, which was alone sufficient to convict him, the improprieties constitute harmless error beyond a reasonable doubt.

Future witness Louis Alexander was charged, in an unrelated prosecution, with felonious assault, MCL 750.82; MSA 28.277, possession of a dangerous weapon, MCL 750.224(1)(d); MSA 28.421(1)(d), and with being an habitual offender, fourth or subsequent offense. MCL 769.12; MSA 28.1084. In fact, Alexander had been convicted of nine prior felonies, including assaults, batteries, burglaries, and escape. Because of his status as an habitual offender, he faced a maximum term of fifteen years' imprisonment with respect to the felonious assault prosecution.

Alexander was held briefly in a cell adjoining the cell occupied by defendant in the county jail. Alexander represented to corrections officers that while defendant was being held in the adjoining cell, he related the details of the offense to Alexander in a manner largely consistent with the facts as set forth above. All of these details had appeared in The Grand Rapids Press, a newspaper to which Alexander had access while in jail, during the days before he contacted the corrections officers about his conversation with defendant. Alexander was interviewed by a detective working on the present case, and an Investigative Interview Form was prepared. Under "Significance of this Person's Involvement with Case," the interviewing detective entered, "Witness."

Several months later, Alexander's pretrial was held. An order was entered reflecting a plea agreement Alexander entered into with the prosecution. The order provided that "upon successful plea and sentencing," the possession of a dangerous weapon charge would be dismissed, the habitual offender charge would be dismissed, and Alexander would be sentenced to not more than nine months in jail.[2] The following day, Alexander tendered his plea. Sentencing was deferred.

A discovery order had been entered in the Wines prosecution. It provided, *inter alia*, that the prosecution was required to make available to defendant the following:

> A summary of negotiations with, or promises made to any prosecution witness, regarding any plea bargaining or sentencing bargaining; leniency, or other negotiations or promises that could be construed as an inducement for the witness to testify.
>
> * * *
>
> All information tending to . . . impeach the credibility of witnesses against the defendant . . . .

The prosecution never disclosed Alexander's plea agreement to the defense.

At trial, Alexander testified for the prosecution. On cross-examination, he averred that he did not ask for or receive any consideration in terms of a plea bargain. He also denied having read any newspaper articles pertaining to the case.

While the jury was deliberating, defense counsel Helen Nieuwenhuis overheard a conversation in the hallway of the courthouse. She heard Prosecutor David Schieber being told, "Mr. Alexander thanks you for that deal." This was the first anyone other than the prosecution and Alexander became aware that Alexander was benefiting from a plea bargain agreement.

Alexander admitted at the hearing ordered by this Court that, immediately after he testified, Schieber stated to him, "I will talk to the judge for you." Schieber also conceded that he spoke on behalf of Alexander to the judge that would be sentencing him. He described Alexander's act of testifying as "noble."

Defendant was convicted of the crimes noted above. According to Alexander, *on the same day* the jury returned its verdict, Alexander was sentenced. Not only were charges dismissed against him, but he received a sentence of time served with respect to the felonious assault conviction, less than the nine month maximum specified in his plea agreement.

Without belaboring the obvious, the terms of the discovery order in the present case were plainly violated. The order required disclosure of "any plea bargaining or sentencing bargaining" and "[a]ll information tending to . . . impeach the credibility of witnesses against the defendant . . . ." Alexander received a wildly beneficial plea agreement, the revelation of which would have damaged or destroyed his credibility at trial, and this was never disclosed to the defense. The order was violated.

The question remains as to the appropriate remedy. As this Court stated in *People v Hatch*, 126 Mich App 399, 402; 337 NW2d 79 (1983), "[w]hen a prosecutor violates a discovery order . . . reversal is mandated unless it is clear that the failure to divulge was harmless beyond a reasonable doubt." However, in addition to constituting a violation of the discovery order, the actions of the prosecution implicate defendant's right to due process. As explained in *US v Bagley*, 473 US 667, 675; 105 S Ct 3375; 87 L Ed 2d 481 (1985), a defendant's due process rights are violated when the prosecutor fails to release evidence favorable to an accused unless the court can find that the information would not have altered the outcome of the trial beyond a reasonable doubt. In neither context does the standard vary because of the willful, as opposed to inadvertent, conduct of the prosecution. Thus, though two distinct issues are implicated, the standard of review is the same – reversal is not warranted where the error was harmless beyond a reasonable doubt.

In the present case, the errors were harmless beyond a reasonable doubt. Alexander's testimony was not crucial to the prosecution's case; it was not even necessary. Alexander offered no evidence that was not introduced through other prosecution witnesses relating the statements of defendant, and, with the exception of legally insignificant details, he offered no evidence that was not offered by defendant himself. Defendant admitted on the stand facts sufficient to support his convictions. Thus, while the actions of the prosecution were reprehensible, we are confident that they had no impact on the outcome of the trial below.

II

Defendant also claims that he was denied effective assistance of counsel because counsel relied on the defense of duress even though it is not available as a defense to homicide. Defendant did not move the trial court for a new trial or an evidentiary hearing as required by *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Thus, review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994), lv den 448 Mich 873; 530 NW2d 754 (1995). To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under the prevailing professional norms, overcoming a strong presumption that counsel's assistance was sound trial strategy, and (2) defendant was prejudiced as a result of the counsel's errors. *People v Johnson*, 451 Mich 115, 121-122; 545 NW2d 637 (1996).

Although defendant is correct that duress is not a defense to homicide, *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996), defendant cannot show that he was prejudiced. Defendant presented evidence to show that he believed he had been forced to go along with Launsburry. In its final instructions, the court informed the jury that the prosecution must prove beyond a reasonable doubt that defendant did not act under duress. Thus, defendant was allowed to present the defense even though it was not legally available. Because defendant cannot show that he was prejudiced, his claim of ineffective assistance of counsel fails.

Defendant also claims that counsel was ineffective regarding advice on a plea. We will not review this issue because the basis for it is not apparent on the record. *Hurst, supra*, p 641.

Defendant's remaining issues were not raised before the trial court and are unpreserved. *People v Malone*, 193 Mich App 366, 371-372; 483 NW2d 470 (1992), aff'd 445 Mich 369; 518 NW2d 418 (1994).

Affirmed.

/s/ Peter D. O'Connell
/s/ Thomas L. Ludington

[1] Launsburry and the present defendant were tried separately. The facts set forth in the present opinion are consistent with the evidence produced at the trial of defendant Wines. The facts set forth in the *Launsburry* opinion reflect the evidence produced at the trial of *Launsburry*. The two diverge because Launsburry, who initially admitted to police that he had killed the victim, later recanted that testimony and claimed that the present defendant had killed the victim. However, Launsburry's testimony was the only evidence supporting this version of events. Because Launsburry did not testify in the trial of defendant, there was no evidence presented in this case suggesting that defendant shot the victim.

[2] The actual plea agreement did not include a provision that defendant testify in the present case.