

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

June 24, 2003

Nos. 238187 and 238198

Wayne Circuit Court

LC Nos. 01-001232, 01-001233
and 01-001234

Before: Talbot, P.J. and Neff and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right his convictions of two counts of aggravated stalking, MCL 750.411i, and one count of malicious destruction of property over \$200, but less than \$1,000, MCL 750.377a(1)(c)(i). Defendant was sentenced to twenty-three months to five years in prison for the two aggravated stalking convictions. Defendant was sentenced to three months to twelve years in prison for the malicious destruction of property conviction. The sentences run concurrently. We affirm.

I. Basic Facts

Defendant's three lower court cases arise from three acts of violence perpetrated on the victim, his former girlfriend. The victim, who had obtained a personal protection order (PPO) against defendant, testified that defendant came to her house at approximately 12:55 a.m. on October 27, 2000, and shot out the rear passenger window of her car.¹ Several hours later, at approximately 3:45 a.m., defendant returned, and shot out the windshield of her car. This shot

¹ In lower court docket number 01-001233, defendant was charged with aggravated stalking; discharge of a firearm from a motor vehicle, MCL 750.234a; malicious destruction of personal property greater than \$200, but less than \$1,000; and possession of a firearm during the commission of a felony, MCL 750.227b.

also struck the living room window of the victim's house.² In the early morning hours on October 29, 2000, defendant also threw a brick through the victim's car window.³

II. Ineffective Assistance of Counsel

Defendant first argues that defense counsel was ineffective. Defendant failed to move for a *Ginther*⁴ hearing below, so our review is limited to errors apparent from the lower court record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Our review of a claim alleging ineffective assistance of counsel is de novo. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for the defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Knapp, supra* at 385. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of showing otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

A. Joinder

Defendant argues that defense counsel was ineffective for failing to object to the joinder of his three lower court cases. We disagree.

Severance is only required in instances where the offenses are unrelated. MCR 6.120(B). Offenses are "related" when they are based on a "series of connected acts or acts constituting part of a single scheme of plan." MCR 6.120(B)(2). The trial court uses its discretion in joining or severing multiple counts. MCR 6.120(C).

MCL 750.411i defines "stalking" as a "willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested." Therefore, the prosecutor would need to show a "course of conduct" and "repeated or continuing harassment." Under the facts of this case, any objection to joinder would have been futile.

Even assuming that defense counsel erred in failing to object to joinder, defendant still fails to show how any "error" was so prejudicial as to deny him his due process rights. The prosecution offered considerable eyewitness testimony that defendant engaged in a pattern of stalking the victim, and damaging her cars. In addition to the victim's own testimony, the prosecution offered several other witnesses who observed defendant near her home, or saw him slash her car tires. Moreover, the prosecution offered two videotapes that purportedly showed

² In lower court docket number 01-001234, defendant was charged with assault with intent to murder, MCL 750.83; discharge of a firearm into a building, MCL 750.234b; aggravated stalking; and felony-firearm.

³ In lower court docket number 01-001232, defendant was charged with aggravated stalking, and malicious destruction of personal property greater than \$200 but less than \$1,000.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant shooting at her car. Finally, aside from the charged acts, significant testimony, from the victim, her niece and Sam Jones, showed that defendant slashed the victim's tires on numerous occasions. Therefore, defendant fails to show how the joinder of these cases, in light of the overwhelming evidence of both charged and uncharged acts, prejudiced him.

B. Alibi Witness

We also reject defendant's argument that defense counsel was ineffective for failing to subpoena and call Katherine Jones and Laquiana Jones to testify at trial. Defendant maintains that Jones would have provided an alibi for defendant for the brick-throwing incident on October 29, 2000.⁵ In essence, defendant offers that Jones would have testified that defendant was with her from 6:00 p.m. on October 28, 2000 until October 29, 2000. Similarly, defendant asserts that Gaines would have testified that defendant drove her to and from work Monday through Friday. However, Gaines' affidavit does not specifically refer to the dates of the charged instances.

A defense counsel's decisions whether to call witnesses are presumed to be matters of trial strategy which cannot give rise to a claim of ineffective assistance of counsel. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d (1994). To overcome this presumption, a defendant must demonstrate that the failure to call the witness deprived him of a substantial defense which would have affected the outcome of the trial. *Id.* A "substantial defense" is one which would have affected the outcome of the proceeding. *Id.*

We conclude that these affidavits or offers of proof do not amount to "alibis" at all, as they fail to provide any defense to the charged offenses. Again, we point out that the first incident occurred at approximately 12:55 a.m. on October 27, 2000, the second incident occurred about 3:45 a.m. that same day, and the third incident occurred on October 29, 2000, also at approximately 3:45 a.m. The "alibis" offered by defendant do not cover that time period. Because defendant fails to show how trial counsel's decision not to call the two "alibi" witnesses denied him the ability to present a defense, his assertion that he was denied effective assistance of counsel is meritless.

III. Juror Questions

Defendant next asserts that he was denied his due process rights to a fair trial because the trial court permitted the jurors to submit questions in writing, which the trial court then asked the witnesses. Because defendant failed to object at trial, our review of the issue is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

This issue was addressed and resolved by our Supreme Court in *People v Heard*, 388 Mich 182, 188; 200 NW2d 73 (1973) wherein the Court held "that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court." *Id.* Here, defendant does not contend that the trial court abused its discretion; rather, defendant generally asserts that the practice was unfair. This argument was rejected in *Heard*. Therefore, we find this argument without merit.

⁵ Defendant's offer of proof, part of his motion to remand, comes in the form of an affidavit of his appellate counsel's paralegal, and not an affidavit from Jones, herself.

IV. Evidentiary Issues

Defendant also raises several evidentiary issues. “The decision whether to admit evidence is within the trial court’s discretion; this Court only reverses such decisions where there is an abuse of discretion.” *People v Lukity*, 460 Mich 484, 488; 596 Mich 607 (1999). An error related to the exclusion of evidence related to a witness’ bias is subject to a harmless error analysis. *People v Minor*, 213 Mich App 682, 684-685; 541 NW2d 576 (1995)

A. The Victim’s Letter

Defendant contends that the trial court erred in excluding a letter written by the victim to James Jones, about the relationship between James’ wife, and defendant, who was involved with the victim at the time. In the key portion of this letter, the victim wrote:

I don’t have anything against Kathy at all. I just don’t want her dating the same guy I’m dating & calling it ‘friendship.’ Oh! Curtis is just as guilty[,] it is not just Kathy & I’m dealing w/ him too.

Defendant contends that this letter evidences the victim’s motive for revenge against him. The victim conceded that she wrote the letter, but indicated that it was written several months to one year before her moving out of defendant’s house, which occurred still another seven months before the incidents giving rise to this case. The trial court excluded this letter on the basis that it was too far removed in time from the charged offenses to be relevant. Defendant fails to show how that ruling was an abuse of discretion. Because the letter speaks in the present, it appears to be more a commentary on the nature of the relationship between the victim and defendant, rather than a threat of future actions.

Even assuming that the trial court abused its discretion in excluding this evidence, defendant still fails to show that he was denied the ability to present a defense. Defense counsel was still permitted to cross-examine the victim about the letter, and asked whether the letter was intended to serve as a threat to defendant. Moreover, defense counsel was still permitted to question the victim’s motivation and credibility. We find no error requiring reversal.

B. The Victim’s Prior Inconsistent Statements

Defendant next asserts that the trial court erred by barring defense counsel from impeaching the victim with prior inconsistent statements after the complainant denied threatening defendant on the telephone and while driving by defendant’s residence. However, a careful review of the record shows that Linda Washington’s testimony does not directly “impeach” or contradict the victim’s testimony. Because the testimony would not have served to impeach the victim’s testimony, the trial court did not err in excluding it.

Even assuming that the trial court erred in excluding this testimony, the error does not warrant a new trial. Defendant was able to introduce evidence to support his theory that the victim concocted the entire story in an attempt to frame him. Specifically, Washington was permitted to testify that she heard the victim make numerous threats to defendant. Therefore, an error in limiting Washington’s answers was not outcome determinative.

Because we find no error in the trial court's decision to exclude this evidence, we also conclude that defendant's was not denied the effective assistance of counsel because his trial counsel failed to properly lay the foundation for this evidence.

V. Videotape

Finally, defendant contends he was denied his due process right because the prosecution failed to provide him with an unredacted copy of a videotape of the victim's house on the night in question. When the unredacted tape was played at trial, it showed a bicyclist ride by the victim's house. The tape provided to defendant before trial did not show the bicyclist.

In *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998), this Court held:

A defendant has a due process right of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of 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. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Here, we fail to see how production of the unredacted tape would have provided a "reasonable probability" of a different outcome. The portion of the tape showing defendant's actions was distinct from the portion of the tape where the bicyclist rode by. Although defendant asserts that he would have been able to interview this bicyclist, there is no way of knowing that this person saw anything related to this case. The jurors were able to view the tape, and were able to identify defendant on that tape. We find no error requiring reversal.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly