

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AUSTIN BOYD HAMMOND,

Hammond-Appellant.

UNPUBLISHED
October 12, 2010

No. 291359
Midland Circuit Court
LC No. 08-003211-AR

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Hammond contests his convictions for second offense misdemeanors of driving with a suspended license¹ and domestic abuse², asserting error by the trial court in the preclusion of testimony by witnesses on his behalf.³ We affirm in part, reverse in part, and remand for further proceedings.⁴

This case arises from allegations that Hammond slapped and pushed a woman he was involved with in a dating relationship and drove his truck a short distance while his operator's license was suspended. Before jury selection, defense counsel identified Hammond and six witnesses he intended to call to testify. After the jury was selected and provided preliminary instructions, the prosecuting attorney expressed concern that he had not anticipated any of the prospective defense witnesses other than Hammond. The district court, on its own motion, declared that it would not allow the "surprise witnesses" to testify. Defense counsel then elected to proceed with a bench trial, explaining, [W]e can't proceed because we can't call anybody,"

¹ MCL 257.904(3)(b).

² MCL 750.31(3).

³ This Court initially denied leave to appeal. Our Supreme Court has remanded the case to this Court with instructions to decide it as if on leave granted. *People v Hammond*, 485 Mich 1045; 777 NW2d 131 (2010). Sentencing proceedings have been stayed pending the outcome of this appeal.

⁴ This appeal has been decided without oral argument pursuant to MCR 7.214(E).

and promising to seek an appeal. The jury was excused and trial began, but defendant did not call any witnesses to the stand or cross-examine the prosecution's witnesses.

The domestic abuse complainant testified that she had dated Hammond for about two years, and during that time she had a baby daughter, whom she then thought was Hammond's child.⁵ On April 8, 2008, the complainant went to Hammond's home to pick up her child and confront him on other issues. Complainant admitted that she yelled at Hammond and that he "kinda pushed" her back by striking her chest with his arm and slapped her face during the confrontation. The complainant acknowledged authoring two letters sent to the prosecutor's office suggesting that the incident was a mere misunderstanding and asking that charges not be pursued. But the complainant did affirmatively testify at trial that Hammond slapped and pushed her during the incident. Under direct questioning by the trial court, complainant acknowledged the exchange with Hammond "was really hot and heated." While complainant admitted that she yelled at Hammond, she denied instigating any physical assault. When questioned further whether Hammond struck her, complainant replied, "Yeah, but . . . it was more just, you know, calm down, get out of my face, you know, don't come at me like this." When asked to elaborate, complainant reiterated that she had been very agitated, and stated, "I really don't think it was intentional on his part." But, upon further inquiry by the trial court, complainant acknowledged the slap was purposeful and not accidental.

On the charge of driving with a suspended license, a police officer testified that he was on duty the morning of April 9, 2008, and was familiar with Hammond from several contacts over the years, including the previous night's domestic violence call. The officer recounted that the Law Enforcement Information Network (LEIN) indicated that Hammond's driver's license was suspended. On April 9, 2008, the officer asserted that he observed Hammond "pulling into the driveway," after which he "got out, and started walking to the back of [a] house . . ." The officer stated that he drove around the block and observed Hammond "headed back down toward his house westbound . . . , pulling up in front" of his residence and then backing up into his driveway.

Defense counsel did not cross-examine either witness, did not call Hammond to testify and offered no closing argument. The trial court found Hammond guilty as charged. Hammond appealed by right in the circuit court. The parties stipulated that the district court erred in striking Hammond's witnesses. The circuit court accepted the stipulation and, while retaining jurisdiction, remanded the case to the district court for an offer of proof on how Hammond's witnesses would have testified.

At the hearing on remand, defense counsel stated that Hammond's stepmother would have testified that complainant came to Hammond's home later on the day in question and appeared as if nothing had occurred earlier, except that her telephone was broken. Counsel continued that a neighbor would have testified that a woman matching complainant's description had been "knocking at the door, trying to open windows, banging at the door with her . . . fist

⁵ DNA testing later revealed that Hammond was not the child's father.

and screaming, to be allowed, let back into the house.” According to counsel, another witness would have testified that complainant denied any form of physical contact by Hammond. Defense counsel also asserted that Hammond’s sister would have recounted “problems” she, Hammond, and others had encountered with the testifying police officer, which resulted in a lawsuit against the officer that had been settled. Defense counsel further stated that Hammond’s stepmother would have testified that Hammond did not drive his vehicle on the morning in question, but instead went outside and smoked a cigarette and that had Hammond started his truck, the noise would have been discernable and caused the barking of dogs. According to counsel, that witness would also have testified that because Hammond was at home the entirety of the preceding night, he could not have been driving at the time alleged by the police officer.

The court treated the erroneous exclusion of the defense witnesses as preserved nonconstitutional error but determined it to be harmless, finding the testimony of the proffered witnesses was not sufficiently likely to affect the verdict.

The decision to admit or preclude evidence is within the trial court’s discretion.⁶ Similarly, we review a trial court’s decision concerning requests for discovery for an abuse of discretion.⁷ Interpretation of a court rule necessitates review de novo.⁸ Because the question of whether the district court erred in disallowing undisclosed witnesses is one of law, the circuit court’s acceptance of the parties’ stipulation without undertaking its own analysis was erroneous.⁹ Such error, however, was harmless because the district court wrongly precluded the witnesses from testifying.

MCR 6.201 governs discovery disclosure and relevant sanctions. MCR 6.001(A) sets forth the rules applicable to felony prosecutions and encompasses the provisions of MCR 6.201. In contrast, MCR 6.001(B) delineates the rules for misdemeanor prosecutions, but does not reference MCR 6.201. Because our Supreme Court has declared that MCR 6.201 is applicable only to criminal felony cases and not misdemeanors¹⁰, the district court erred in requiring defense counsel to fulfill a nonexistent duty of disclosure.

Where preserved error is constitutional in nature, but “is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt.”¹¹ A defendant presenting a

⁶ *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

⁷ *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

⁸ *People v Waclawski*, 286 Mich App 634, 703; 780 NW2d 321 (2009).

⁹ See *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000).

¹⁰ See *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 450 n 6; 722 NW2d 254 (2006), citing Administrative Order 1999-3.

¹¹ *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

preserved claim of nonconstitutional error bears the burden of showing that it is more probable than not that the error affected the outcome.¹² Error related to the admission of evidence that does not implicate a specific constitutional guarantee or right is nonconstitutional in nature.¹³ Had the district court wholly precluded Hammond from presenting a defense, we would treat that as structural error not subject to harmless-error analysis.¹⁴ But Hammond remained free to take the stand and defense counsel was at liberty to cross-examine the prosecution witnesses and offer closing argument. Defense counsel's decision to forego those opportunities appears to have been a strategic decision to underscore the district's court's error in an effort to bolster the potential for securing a new trial or obtaining an acquittal for his client. Based on the recognized premise that a criminal defendant is entitled to a fair trial, not a perfect one,¹⁵ we will not attribute defense counsel's decision to proceed without a jury, while declining to cross-examine prosecution witnesses or offer closing argument to the district court's error.

The relevant question to be addressed is to what extent would Hammond's proposed witnesses have aided in his defense if they had been permitted to testify. We conclude that the offer of proof revealed important defense opportunities for only one of the crimes for which Hammond was convicted.

The complainant's testimony at trial revealed her reluctance to see Hammond prosecuted and the inconsistencies in her representations to authorities. Testimony about a prior inconsistent statement that Hammond did not touch her would have done little to undermine her repeated admissions under oath that Hammond had slapped and pushed her. Hammond contends that testimony indicating that complainant was seriously agitated and that her telephone was broken would have suggested that complainant was in fact the aggressor in this situation. Any implication that Hammond was acting in self-defense is raised for the first time on appeal. In fact, complainant's acknowledged level of agitation is consistent with the evidence that Hammond slapped and pushed her. Similarly, testimony that complainant appeared calm later in the day would have done little to counter the evidence of only minor aggression against her earlier, especially when considered in conjunction with her subsequent and inconsistent attempts to minimize her initial account of what occurred between these individuals. For these reasons, we find that the witnesses defense counsel wished to call would have done little to undermine complainant's account of Hammond's domestic abuse. Their erroneous exclusion did not deprive Hammond of a defense and comprised preserved nonconstitutional error. Because it is

¹² *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

¹³ *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001).

¹⁴ See *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984), citing US Const, Ams VI and XIV, and Const 1963, art 1, §§ 13, 17, 20.

¹⁵ *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

unlikely that the error of precluding these witnesses affected the outcome, the error is deemed to be harmless.¹⁶

To the extent that Hammond and others had “problems,” that resulted in settled litigation, with the police officer who testified to seeing Hammond driving without a valid license, such inquiry went to the officer’s credibility, not to the elements of the crime charged. Defense counsel could have cross-examined the officer but would have been obliged to accept his response without recourse to extrinsic impeachment evidence.¹⁷ Because the witness defense counsel wished to proffer for that purpose would not have been permitted to present such testimony, exclusion of that witness comprised harmless error.

But the denial of the testimony of Hammond’s stepmother raises a more serious concern. The court held that the stepmother’s description of Hammond’s behavior, concerned April 8, 2008, not April 9, which is the date on which the police officer described seeing Hammond drive. But defense counsel specified only April 8 in his offer of proof, and being home “all evening” on that date better suggests the evening of April 8 followed by the early morning of April 9 rather than the early morning of April 8 as preceded by the evening of April 7, as assumed by the trial court. Assuming that Hammond’s stepmother would have testified as anticipated, she would have directly contradicted the account of the police officer. The district court’s refusal to allow Hammond’s stepmother to testify renders it impossible to determine how credible the finder of fact would have found her at trial. We conclude that the error in precluding this witness effectively deprived Hammond of his right to present a defense necessitating the reversal of his conviction of driving on a suspended license. We hereby vacate that conviction and remand this case to the district court for further proceedings.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter

¹⁶ See *Lukity*, 460 Mich at 495.

¹⁷ MRE 608(b).