STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2007
v	No. 269574 Macomb Circuit Court
ANTHONY JEROME DELEON, Defendant-Appellant.	LC No. 2005-003245-FC

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the April 1998 shooting death of his wife, Karen DeLeon, who died from a single gunshot wound to the head. Police found several bags packed with the woman's clothing. Defendant claimed to be present at the time of the shooting and further claimed to hold his wife closely right after the shooting, but police found him clean and emotionless when they arrived at the scene. Shortly after the shooting, the medical examiner certified the manner of death as "undeterminable." A toxicology report indicated that the decedent had consumed a large, possibly fatal, amount of Butalbital. The police file was closed in June 1998, because the police determined that there was no direct evidence that the decedent's death was anything other than a suicide. Much of the physical evidence was destroyed, including the decedent's numerous prescription medications and the clothing she was wearing at the time of her death. The case was later reopened in 2002, after defendant assaulted his live-in fiancée by wrestling her to the floor and telling her he was going to kill her. The assault was precipitated in large part by the fiancée's communication of her desire to end the relationship. In June 2005, defendant was charged with first-degree murder in connection with the decedent's death.

Testimony indicates that, at least in retrospect, some witnesses believed that defendant acted suspiciously on the night his wife died. There was also evidence that the decedent had a history of prescription drug abuse and a previous suicide attempt. Although testimony at trial portrayed defendant as controlling and insensitive toward the decedent, no one ever saw him

physically assault the decedent, and she never complained to anyone of physical abuse. Evidence of defendant's 2002 assault of his fiancée was presented at defendant's trial.

Defendant first argues on appeal that the trial court abused its discretion by denying his pretrial motion to dismiss because of prearrest delay. We disagree. A trial court's decision on a motion to dismiss on the basis of prearrest delay is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). "Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000).

In this case, the prosecution conceded below that defendant was prejudiced by the delay because physical evidence had been destroyed. However, there was no evidence that the prosecution delayed further investigation or arrest for tactical reasons. Rather, the police investigation was concluded, and the police file was closed shortly after the shooting because the decedent's death was originally believed to be a suicide. It was not until several years later, after defendant assaulted his fiancée, that the police reopened the investigation. Because there was no evidence that the prosecution delayed charging defendant to gain a tactical advantage, the trial court did not abuse its discretion by denying defendant's motion to dismiss.

Defendant next argues that the trial court erred by denying his request to instruct the jury that it could infer that the destroyed evidence would have been favorable to the defense. We disagree. We review claims of instructional error de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). A defendant is entitled to an adverse inference instruction regarding the loss or destruction of potentially exculpatory evidence only upon a showing of bad faith. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). The fact that police destroyed the evidence intentionally does not automatically demonstrate bad faith, and even actions that could be considered shortsighted or negligent do not satisfy the bad faith requirement. See *id*.; *United States v Garza*, 435 F3d 73, 75 (CA 1 2006). A showing that evidence was destroyed in the course of a routine procedure generally contravenes a finding of bad faith. *Id.* at 76.

This case is distinguishable from *People v Albert*, 89 Mich App 350, 352-354; 280 NW2d 523 (1979), because it does not involve a situation in which the police destroyed evidence in a pending case with knowledge of its importance to the defendant. Instead, the police investigation was concluded shortly after the decedent's death because the evidence of suicide was strong enough to persuade police that defendant's odd behavior after the shooting, such as cleaning the weapon and the murder scene, were unrelated to actually shooting the decedent. The evidence was destroyed approximately a year and a half later as part of routine procedure because there was no pending investigation. Although some officers had suspicions that defendant was involved in his wife's death, no charges were ever filed and no investigation was pending at the time the evidence was destroyed. The case remained closed until the police reconsidered the decedent's death after defendant's 2002 assault of his fiancée. Even if the destruction of the evidence could be characterized as shortsighted or negligent, there is nothing to suggest that the police were motivated by malice or improper purpose. See *Garza*, *supra* at 75. Therefore, the trial court did not err by denying defendant's request for an adverse inference instruction.

Defendant also argues that the prosecutor engaged in misconduct during his questioning of defense expert, Dr. Ljuvisa Dragovic. We review issues of prosecutorial misconduct on a case-by-case basis to determine whether defendant was denied a fair and impartial trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

The prosecutor's questions concerning pending criminal charges against Dr. Dragovic's son were focused on determining whether Dr. Dragovic was biased against the Macomb County Prosecutor's Office because it was prosecuting his son. Because a witness's bias is always relevant, and the jury may consider any fact that might influence the witness's testimony, *People v Morton*, 213 Mich App 331, 334-335; 539 NW2d 771 (1995), the prosecutor did not commit misconduct by pursuing this limited inquiry. Next, the prosecutor's inquiry into whether Dr. Dragovic had "ever conducted experiments on live individuals by shooting them in the head to see how much blowback blood evidence will occur" essentially challenged the basis for Dr. Dragovic's opinion. The question was largely rhetorical and did not deny defendant a fair and impartial trial. Lastly, defendant did not object to the prosecutor's questions concerning whether Dr. Dragovic was being compensated for his testimony, and the questions did not constitute plain error because defendant first raised this subject in his direct examination. See *People v Verburg*, 170 Mich App 490, 498; 430 NW2d 775 (1988).

Next, defendant argues that the trial court abused its discretion by admitting, under MRE 404(b), the evidence that he assaulted his fiancée in 2002. Although we agree that the circumstances surrounding the murder and defendant's assault of his fiancée were dissimilar in many respects, defendant's claim of error does not have a practical remedy. If we found an error in the introduction of this evidence, then the ordinary cure would be to remand to the trial court with instructions that it must hold a new trial and exclude the challenged evidence. However, under the recently enacted MCL 768.27b, the prosecutor would be allowed to present the fiancée's testimony and other related evidence in the new trial because it is evidence that defendant committed another domestic assault. The domestic assault against defendant's fiancée would be relevant to defendant's murder case because it demonstrates that defendant reacted violently toward his fiancée when she threatened to leave him, increasing the probability that he had a similar violent reaction when his wife packed up and prepared to leave. Under the circumstances, remand would only result in redundant trial proceedings, so defendant's arguments regarding his fiancée's MRE 404(b) evidence are moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

In light of our decision, it is unnecessary to address defendant's several claims of ineffective assistance of counsel related to trial counsel's lack of objection to these issues. However, defendant also claims that defense counsel was ineffective for failing to call witnesses that would bolster his claim that his wife committed suicide. We disagree. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Specifically, defendant argues that counsel was ineffective for failing to call Detective James Krause, who closed the file as a suicide, Dr. Barbara Beebe, a psychologist who had no independent recollection of any relevant events but who treated the decedent for her failed suicide attempt in 1996, and Dr. Herbert MacDonnell, who would have opined that the death was a suicide on the basis of gunshot residue testing conducted by others and introduced at trial.

Near the end of trial, the trial court asked what witnesses remained for the defense and defendant's trial counsel responded, "Your honor, at the present time we have Dr. McDonald [sic] and Ms. Karen Hillis and -- . . . We also have Lieutenant Kraus [sic] and three doctors that are still subpoenaed." The next day, after Hillis testified, defense counsel advised the trial court that "we have not been able to get in contact with Dr. McDonald [sic] who was going to be our next witness. His wife had an emergency. He flew out abruptly last night." Defense counsel concluded, "I will not be calling any further witnesses . . . ."

After trial, the trial court heard motions regarding expenses involving Dr. Beebe. Defense counsel explained at that time that the trial court had ordered both attorneys to have "a ready supply of witnesses on hand at all times," and that Dr. Beebe was not called "due to reasons beyond our control, and also because we received pretty much the same information on the witness stand from two other witnesses. Therefore, I was able to release . . . Dr. Beebe . . . ." Evidence of the decedent's 1996 suicide attempt was presented through Hillis. In sum, presentation of Dr. Beebe's testimony would not have added anything of substance to defendant's strong, but rejected, suicide defense, so defendant has failed to demonstrate that defense counsel's decision to rest without calling her constitutes ineffective assistance of counsel. *Id*. Likewise, Dr. MacDonald's testimony would have added little beyond rehashing the residue report. We also reject defendant's argument that counsel should have called Dr. MacDonald earlier to avoid the possibility that he would leave town before he took the stand, because decisions about the order in which to present evidence and decisions about calling and questioning witnesses, generally are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Finally, it appears from counsel's later statements that the decision not to call Detective Krause was intentional. Krause's 1998 report indicated that the file was closed because of evidence that gunpowder residue remained on decedent's left hand and the file lacked any direct evidence of murder. The residue report was thoroughly reviewed at trial, and Krause's testimony about closing the file would have been cumulative to the testimony of the other officers involved in the case. Because defense counsel's failure to call Krause did not deprive defendant of his opportunity to present the suicide defense, defendant fails to demonstrate that his trial counsel performed ineffectively. *Dixon*, *supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald