

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

STEVEN EUGENE BOOTH,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 200290
Macomb Circuit Court
LC No. 94-002618 FC

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of solicitation of murder, MCL 750.157b; MSA 28.354(2). He was sentenced to ten to twenty-five years' imprisonment. Defendant appeals as of right. We affirm, but remand to the trial court for correction of the presentence report.

First, defendant argues that the trial court erred in admitting prior bad acts evidence. He argues that the trial court abused its discretion when it admitted testimony from Christopher Kuczmarski and Harmon Thomas Callihan indicating that defendant had stated he wanted to kill his stepfather ten or eleven years prior to the instant offense. However, we find the testimony of both witnesses to be admissible under MRE 801(d)(2). The witnesses were testifying as to statements made by defendant, and not prior acts of defendant. The appropriate analysis is whether defendant's prior statements were relevant and whether the probative value outweighed its prejudicial effect. *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988).

Relevance is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Defendant argues that these statements are too remote in time from the instant offense and therefore, are irrelevant. Defendant rationalizes this theory based on MRE 609(c), which prevents impeachment of a defendant with prior convictions that are more than ten years old. We disagree with defendant's analogy. MRE 609(c) is used to attack the credibility of a crime. Here, the statements are used as substantive evidence. Moreover, the consequential factual proposition

that defendant solicited the murder of his stepfather, is more probable with the testimony of his repeated threats to kill his stepfather, than without the evidence. Accordingly, we find the evidence legally relevant.

The probative value of the evidence offered must also not be substantially outweighed by its potential for unfair prejudice. MRE 403; *Id.* The evidence of defendant's prior threats is prejudicial. However, all relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909, modified 450 Mich 1212 (1995). Unfair prejudice exists when there is a tendency for the evidence to be given undue weight. *Id.* at 75-76. After review of the record, we find that no such prejudice exists.

Defendant also argues that the trial court erred in admitting the testimony of Timothy Radloff, who testified that defendant, on a prior occasion while incarcerated in jail, solicited him to assault an individual in exchange for posting his bond. In order for bad acts evidence to be admissible under MRE 404(b), it must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *VanderVliet, supra* at 74. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.*

We agree that the trial court abused its discretion by admitting Radloff's testimony on the grounds that it was used for the proper purposes of proving defendant's motive, intent, and state of mind. First, this evidence does not constitute proof of defendant's motive or intent. "Motive," as used in MRE 404(b), is defined as "the moving power which impels to action for a definite result." *People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997) (quoting Black's Law Dictionary [Rev 5th ed]). The legal definition of motive differs subtly from the definition of intent, which is "the purpose to use a particular means to effect" a definite result. *Id.* We believe that, had defendant solicited Radloff to cause harm to his stepfather, this evidence might be admissible as proof of defendant's motive and intent. In that scenario, the evidence would show defendant's wish to harm his stepfather, his motive, or "the moving power which impels to action for a definite result," as well as the particular means by which defendant planned to effectuate this harm and escape detection, i.e., by paying another person to commit the act. However, the evidence in its present form only conceivably can support the conclusions that defendant wished harm on another person, and that he intended to hurt this other person by soliciting another to do the criminal act. To use this evidence to support the conclusions that defendant wished ill toward his stepfather and solicited another to bring about that result, simply because he had directed a similar act toward another person at a different time, is to use this evidence to establish defendant's character or propensity to commit the crime for which he was prosecuted, which, of course, MRE 404(b) prohibits. *VanderVliet, supra*.

Second, we are not persuaded by the trial court's reasoning that this evidence constitutes proof of defendant's state of mind. Standing alone, it is unclear how this evidence sheds light on defendant's mental state at the time he solicited Robert Hills to kill his stepfather. Again, it appears that this evidence was used simply to show that defendant harbored a violent wish to kill his stepfather solely

because defendant had a similar desire that he directed toward another person in the past. Used in this manner, this evidence violates MRE 404(b). *Id.*

While the trial court abused its discretion in admitting this evidence, reversal is not necessary, because the error in admitting the evidence was harmless. See MCR 2.613(A), MCL 769.26; MSA 28.1096. An error that might require reversal if committed in a jury trial can be harmless if committed at a bench trial, as here, because, unlike a jury, the judge is equipped with a knowledge of the law that allows him to ignore errors and decide a case solely on properly admitted evidence. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Here, notwithstanding admission of Radloff's testimony, the trial court gave detailed findings of fact, identifying numerous pieces of evidence that overwhelmingly supported its finding of guilt. Based on the testimony of Robert Hills alone, whom the trial court found to be credible regardless of Hills' dislike for defendant, the trial court could have found defendant guilty beyond a reasonable doubt of solicitation of murder. Thus, reversal is not warranted.

Next, defendant argues that the trial court abused its discretion in ruling that the prosecution exercised due diligence to produce Timothy Radloff, an endorsed witness. Unless the prosecution seeks to delete a witness from its witness list, it is obliged to exercise due diligence to produce all endorsed witnesses. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). However, a prosecutor may be relieved of the duty to produce an endorsed witness by showing that the witness could not be produced, despite the exercise of due diligence. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Due diligence is the attempt to do everything reasonable, not everything possible to obtain the presence of a witness. *Id.*

Here, an evidentiary hearing was held and Detective Bartholomew testified that Radloff was incarcerated in the Macomb County Jail on November 6, 1996, the day before trial in the instant case was to begin. Bartholomew served Radloff while in jail, but noted that he would be released the next morning at 6:00 a.m. He testified that he put \$5 in Radloff's account so that he could buy breakfast in the morning while he waited until 9:00 a.m., the time he was to appear in court. Radloff did not appear on November 7, 1996, so Bartholomew attempted to contact him at home, and spoke with his stepfather, who indicated that Radloff was a coke addict and was not welcome at home. Bartholomew testified that based upon previous experiences with Radloff, he knew that further efforts to locate him would be futile. After review of the record, we find that based upon the testimony of Bartholomew, the trial court did not abuse its discretion in ruling that the prosecution used due diligence to produce Radloff.

Next, defendant argues that the trial court erred in not dismissing the charges against him when the prosecution failed to turn over previously requested discovery materials until the middle of trial. We review a trial court's determination of an appropriate remedy for discovery violation for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

Upon request, the prosecution must provide a defendant with (1) any exculpatory information the prosecutor knows; (2) police reports concerning the case; (3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective trial witness; (4) any

affidavit, warrant, and return pertaining to a search and seizure in connection with the case; and (5) any plea agreement, grant of immunity, or other agreement

for testimony in the case. MCR 6.201(B); *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). Due process is implicated when the prosecutor fails to disclose exculpatory evidence, regardless of whether the defendant requested it; where the prosecutor allows false testimony to stand uncorrected; and when the defendant served a timely request on the prosecutor and material evidence, favorable to the accused is suppressed. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). A prosecutor's failure to provide the defense with inculpatory evidence, a violation which does not implicate due process rights, does not necessarily require reversal. *Davie*, *supra* at 597-598.

Following an evidentiary hearing, the trial court found that there was no deliberate attempt by the prosecution to withhold discovery. Moreover, after reviewing the evidence withheld, the court ruled that none of the evidence presented a surprise to defendant based upon the evidence previously presented in trial. The court also noted that defense counsel had ample time to review the evidence given a four-day break in the trial and furthermore, he never requested a continuance. Although the withheld discovery materials were not presented for our review, it appears that the evidence was not exculpatory and therefore, reversal is not required. Furthermore, given the circumstances, we find the trial court did not abuse its discretion.

Finally, defendant argues that he is entitled to have his presentence report corrected. We agree. At sentencing, defendant objected to the pending warrant information contained in the report. The preparer of the report was present in court and confirmed that the pending warrant did not apply to defendant, but rather was erroneously put in the report. The trial court indicated that it would delete that information from the report; however, it appears that it was never done. When a sentencing court states that it will disregard information in a presentence report challenged as inaccurate, the defendant is entitled to have the information stricken from the report, prior to it being transmitted to the Department of Corrections. MCL 771.14(5); MSA 28.1144(5); *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). We find defendant is entitled to have his presentence report corrected.

We affirm defendant's conviction, but remand the case to the circuit court so that the challenged information in the presentence report may be stricken. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ William C. Whitbeck