STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2011
v	No. 296521 Cass Circuit Court
KEVIN WILLIAMS, Defendant-Appellant.	LC No. 09-010055-FC

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, for two counts of assault with intent to murder, MCL 750.83, and one count of unlawfully driving away an automobile (UDAA), MCL 750.413. He was sentenced, as a fourth habitual offender, MCL 769.12, to concurrent terms of 25 to 50 years' imprisonment for each of the assault convictions and 3 to 15 years' imprisonment for the UDAA conviction. Because defendant was not denied the effective assistance of counsel, we affirm.

Defendant's convictions arise from the February 7, 2009 stabbing of Robert Kirkland and Clara Peters. Defendant admits that he was present when Kirkland and Peters were stabbed, but he denies responsibility for the stabbings. Peters identified defendant as the perpetrator of the stabbings during the 911 telephone call the night of the stabbings, and Peters and Kirkland each identified defendant as their assailant during subsequent statements to police and at trial. Additionally, defendant's brother testified that on the night of the stabbings, defendant took his automobile without permission. Defendant then drove to Missouri, where he was subsequently apprehended.

On appeal defendant first argues that he was afforded ineffective assistance of counsel at trial when his trial counsel failed to bring to the court's attention that defendant's former counsel in this case also represented a prosecution witness. Defendant asserts that his trial counsel should have sought to exclude the witness's testimony and to disqualify the prosecutor's office. We disagree.

Defendant raised this issue for the first time on appeal in a motion to remand for an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), which this Court denied. Therefore, no evidentiary hearing was held. Consequently, this Court's review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the

record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that but for defense counsel's error at trial the result of the proceedings would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001); *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). That is, defendant must first show that trial counsel's performance was "deficient," and then establish that this "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Counsel is not ineffective for failing to assert a meritless legal position. *People v Unger*, 278 Mich App 210, 242-243, 255, 256; 749 NW2d 272 (2008).

A lawyer acting with a conflict of interest denies a defendant the effective assistance of counsel by breaching "the duty of loyalty, perhaps the most basic of counsel's duties." *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998), citing *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish that a lawyer's conflict of interest has violated his right to the effective assistance of counsel, and to presume prejudice arising from that conflict, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *Smith*, 456 Mich at 557. Michigan Rule of Professional Responsibility (MRPC) 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

As this Court has explained, "[a]n attorney does not necessarily breach his or her duty of loyalty and confidentiality to a former client by representing a new client whose interests are merely adverse to those of the former client. The attorney breaches his or her fiduciary duty to a former client only by undertaking representation of a client who has interests both adverse and substantially related to work the attorney performed for the former client." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 604; 792 NW2d 344 (2010).

Attorney Dale Blunier was originally appointed to represent defendant and he served as defendant's counsel during the initial stages of this case until April 30, 2009, when he was replaced by retained counsel, Sidney Tall. Meanwhile, Blunier also had been appointed to represent Bobby Cliett in an unrelated, separate and distinct criminal matter arising from a home invasion to which Cliett pleaded guilty. After Tall had replaced Blunier as defendant's counsel, and after Cliett had pleaded guilty to the separate charges against him but before Cliett was sentenced, Cliett wrote a letter to Blunier advising that he had information regarding defendant's involvement in this case. Defendant and Cliett had been in jail at the same time. Blunier contacted the police, providing them with the letter he received from Cliett. Police then interviewed Cliett, who informed them that defendant had admitted that to stabbing Kirkland and Peters. In exchange for his "truthful testimony" against defendant, plaintiff agreed to provide Cliett with a favorable sentencing recommendation in his separate criminal proceeding.

The matters in which Blunier represented defendant and Cliett are distinct and unrelated. At the time Blunier's representation of each commenced, and at all times until Cliett advised Blunier that he had information detrimental to defendant, there was no actual or implied conflict of interest. Moreover, that Cliett obtained information detrimental to defendant during the course of Blunier's representation of Cliett was merely fortuitous; it could not have been expected and it was not related in any way to Blunier's representation of either party. Nor does defendant allege, or the record in any way support an inference, that Blunier provided Cliett with confidential information he received from defendant, or that Blunier used confidential information from defendant to aid Blunier in his representation of Cliett. Moreover, contrary to defendant's assertion, this is not a case where defense counsel "switched sides," as in *People v Davenport*, 280 Mich App 464, 466-467; 760 NW2d 743 (2008), where the defendant's former counsel ended his representation of defendant to join the two-person prosecutor's office during the pendency of defendant's prosecution. Rather, here, counsel was appointed to represent two defendants in unrelated, separate and distinct criminal prosecutions, and, thereafter, as a result of the coincidental fact that the two parties were housed together in the local jail and one spoke to the other about his criminal case, one became a witness against another. We find that, under these circumstances, Blunier's representation of defendant and Cliett did not present an actual conflict of interest.

Certainly, Cliett's interest in obtaining a favorable recommendation from plaintiff at sentencing by testifying against defendant was adverse to defendant's interest in not having Cliett testify against him. However, to prevail on his assertion that Blunier had a conflict of interest, defendant must establish that the legal services Blunier provided to Cliett "were substantially related to the subjects of [Blunier's] former representation" of defendant. *Alpha Capital Mgt*, 287 Mich App at 604, 609. They were not. Blunier's legal services to Cliett consisted, generally, of representing Cliett in an unrelated criminal matter. Viewed narrowly, it could perhaps be said that Blunier's representation of Cliett for the purpose of advising the prosecution that Cliett had information adverse to defendant was "substantially related to" Blunier's prior representation of defendant. However, even if we were to conclude that a conflict of interest arose at the moment that Blunier became aware that Cliett had information favorable to the prosecution in this case, defendant cannot establish that there is a reasonable probability that but for Tall's failure to raise the issue the outcome of defendant's trial would have been different. *Rodgers*, 248 Mich App at 714; *Henry*, 239 Mich App at 145-146. Defendant has not offered any authority establishing that the trial court would have, or that it should have, precluded Cliett's testimony at trial. There is no indication that Cliett's testimony was the result of or was improperly influenced by Blunier's previous representation of defendant. And, had the trial court disqualified Blunier from continued representation of Cliett, there is no indication that if represented by different counsel Cliett would have not testified or would have testified any differently at trial. Therefore, Tall cannot be deemed to have been ineffective for failing to move to exclude Cliett's testimony. *Unger*, 278 Mich App at 255.

Additionally, defendant has not offered any authority indicating that a motion to disqualify the prosecutor's office from the instant case would have been successful. As this Court explained in *Davenport*, 280 Mich App at 472, quoting *In re Osborne*, 459 Mich 360, 369-371; 589 NW2d 763 (1999), "our Supreme Court has held that, in order to disqualify an entire prosecutor's office, a court must consider 'the extent to which knowledge has been shared by the disqualified lawyer and the disqualified lawyer's role within the prosecutor's office.'" There is

no indication whatsoever that Blunier shared any information obtained during his representation of defendant with the prosecutor's office and Blunier had no role within that office. Consequently, there would have been no basis for the trial court to disqualify the prosecutor's office from representing the people in this case. Thus, Tall cannot be deemed to have been ineffective for failing to move to disqualify the prosecutor's office from this case. *Unger*, 278 Mich App at 255.

Furthermore, considering the overwhelming evidence of his guilt, defendant cannot establish that the outcome of his trial would have been different but for counsel's failure to raise the conflict issue or move to disqualify the prosecutor's office. Even if Blunier had been disqualified from further representation of Cliett or Cliett's testimony had been excluded, there is no indication that defendant would have been acquitted. Kirkland and Peters each immediately and consistently identified defendant as their assailant and the testimony of other witnesses, including that of police officers describing the scene of the crime and the forensic evidence, tended to corroborate their version of events. Finally, both defendant's flight following the assault and threats he made in an attempt to dissuade Cliett from testifying against him demonstrate a consciousness of guilt. *People v Smelley*, 485 Mich 1023, 1024; 776 NW2d 310 (2010); *People v Sholl*, 453 Mich 730, 740; 556 NW2s 851 (1996); *Unger*, 278 Mich App at 226; *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Thus, we conclude that defendant was not denied the effective assistance of counsel.

Defendant also argues that he was denied the effective assistance of counsel at trial when Tall failed to object to testimony regarding threats defendant made to Cliett and others while he was being held in the local jail. We disagree.

MRE 404(b)(1) prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing that defendant acted in conformity with his criminal character. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). However, such evidence may be admissible for non-character purposes under MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other-acts evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the charged offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005).

Evidence is not subject to MRE 404(b) analysis merely because it discloses a bad act. If the other-acts evidence is "in any way relevant to a fact in issue," and "does not involve the intermediate inference of character," it is admissible as substantive evidence without regard to MRE 404(b). *VanderVliet*, 444 Mich at 64. It is well-settled that a defendant's attempt to dissuade a witness from testifying against him is generally admissible as substantive evidence because it relates directly to the defendant's consciousness of guilt. *Sholl*, 453 Mich at 740; *Mock*, 108 Mich App at 389. Consequently, Cliett's testimony that defendant threatened to harm him if he testified against defendant was admissible as substantive evidence against defendant. And, testimony from corrections officer Mike Bradley that defendant was moved to a different cell block because of his threatening behavior toward other inmates and jail staff was admissible to rebut defendant's testimony that he did not make such threats and to corroborate Cliett's testimony. Accordingly, counsel was not ineffective for failing to object to this testimony. *Unger*, 278 Mich App at 256.

Additionally, a defendant's testimony can open the door to responsive cross-examination, and defense counsel's questioning of a witness can likewise permit the introduction of responsive testimony without implicating MRE 404(b). See *People v Lukity*, 460 Mich 484, 498-499; 596 NW2d 607 (1999); see also *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008) ("A prosecutor may fairly respond to an issue raised by the defendant."); *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993) (when a defendant raises an issue, he opens the door to a full, and not just selective, development of that issue). The defense attempted to establish during its cross-examination of Cliett that Cliett was testifying falsely in order to obtain a favorable sentencing recommendation from the prosecution. Cliett's testimony that he feared for his life as the result of defendant's threats was responsive to this assertion. Further, Bradley's testimony that defendant made numerous threats to other inmates and jail staff was admissible to corroborate Cliett's testimony, as well as to directly rebut defendant's testimony that he had not threatened any other inmates.

While generally a prosecutor must provide reasonable notice of his intent to present other-acts evidence, MRE 404(b)(2), this requirement does not apply to evidence introduced to rebut the defendant's evidence. *Lukity*, 460 Mich at 499-500; *People v McRunels*, 237 Mich App 168, 183; 603 NW2d 95 (1999). Accordingly, no notice was required here. *Id*.

Finally, even were we to conclude that the evidence of defendant's threats was inadmissible and that counsel was deficient for failing to object to it, considering the overwhelming evidence of his guilt defendant has not established that the outcome of his trial would have been different absent this evidence. As we previously observed, Kirkland and Peters each immediately and consistently identified defendant as their assailant, and the testimony of other witnesses, including that of police officers describing the scene of the crime and the forensic evidence, tended to corroborate their version of events. Moreover, defendant's flight following the assault demonstrated his consciousness of guilt. *Smelley*, 485 Mich at 1024; *Unger*, 278 Mich App at 226; *Coleman*, 210 Mich App at 4. Consequently, we conclude that defendant was not denied effective assistance of counsel at trial by counsel's failure to object to evidence regarding defendant's threatening behavior while in jail. Reversal of defendant's convictions is unwarranted.

Affirmed.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause