

STATE OF MICHIGAN

IN THE SIXTEENTH CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Case No. 2013-4215-FC

RONALD ANTHONY DI MAMBRO, JR.,

Defendant.

RECEIVED AND FILED
JAN 07 2015
APPEALS DIVISION
OFFICE OF PROSECUTING ATTORNEY
OPINION AND ORDER

This matter is before the Court on defendant's motion for a new trial after remand from the Court of Appeals.

I. Background

Defendant was convicted by a jury of first-degree felony murder and first-degree child abuse on June 10, 2014 for the death of two-year old Damian Sutton in 2013. Defendant appealed based on ineffective assistance of trial counsel. He filed a motion for a new trial in this Court and a motion for remand for a *Ginther*¹ hearing with the Court of Appeals.

Defendant included in his motion an affidavit by the Oakland County Medical Examiner Dr. Ljubisa J. Dragovic, and a declaration biomechanics engineer, Dr. Chris A. Van Ee, who specializes in pediatric head injuries. Dr. Dragovic stated that the autopsy did not support the conclusion of the People's expert witnesses – Macomb County Medical Examiner Dr. Spitz, and

¹*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Dr. Angelilli – that Damian’s death was a homicide. Dr. Dragovic indicated that the autopsy did not go far enough to ascertain how old the brain injuries were. Further, Dr. Dragovic stated that the Drs. failed to correlate the set circumstances that they believed produced the blunt force head trauma with the injury depicted in the autopsy. Dr. Dragovic believed the Drs “bridged the gap of unknown by opinion that the manner of the toddler’s death was homicide.” See Defendant’s Motion, Appendix I. As such, he concluded that the autopsy did not preclude a finding that Damian’s head injury was accidentally caused by his fall from a bar stool onto ceramic tile a day before his hospitalization.

Dr. Van Ee’s findings also supported the possibility that a short fall with the wrong combination of fall dynamics could accidentally cause a fatal head trauma in a toddler. He further opined that Dr. Angelilli lacked the expertise to testify Damian’s fall from the bar stool could not have caused his fatal injuries. Finally, he noted that the deficiencies in the autopsy limited his ability to consider the circumstances of Damian’s injury because the he did not know how old it was.

In light of the above, the Court of Appeals granted the remand. This Court set the *Ginther* hearing for June 30, 2015. However, when the parties appeared on that date, defendant’s appellate counsel indicated that he had just received 32 new images of the brain autopsy (i.e., the neuropathology exam) from the People. The People indicated that the Macomb County Medical Examiner Dr. Daniel Spitz had just produced them. The parties stipulated that neither the People nor defendant’s trial counsel, nor defendant’s expert Dr. Bader Cassin, had the opportunity to review the photos before June 29, 2015. The evidentiary hearing was adjourned to September 2, 2015 and September 15, 2015 in order to allow Drs. Dragovic, Van EE, and Angelelli to review the new evidence.

Following the hearing, the defendant supplemented his motion for a new trial on October 16, 2015. The People responded in opposition on November 25, 2015. The Court now considers the motion in light of the evidence presented at the hearing.

II. Standard of Review

MCR 6.431 governs motions for a new criminal trial after remand. The trial court may order a new trial for any ground that that would support appellate reversal, or because it believes the verdict has resulted in a miscarriage of justice. MCR 6.431(B). A trial court's decision on a motion for new trial will not be disturbed absent an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); see also *United States v Pierce*, 62 F3d 818, 823 (CA 6 1995).

III. Party Arguments

A. Defendant

Defendant raises a number of sub points in his motion, but all can be categorized under one of three main claims for relief. First, defendant alleges that the failure of the Medical Examiner's officer to disclose the 32 neuropathology photos before trial pursuant to trial counsel's discovery request constitutes reversible error under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Defendant argues that the photos were material and exculpatory because they were the photos documenting each phase of the fatal brain injury exam. Defendant contends that, although these photos were not produced, Dr. Spitz clearly relied on them for forming his opinion of the case. Therefore, without these photos, defendant contends that his trial counsel was unable to effectively impeach Dr. Spitz's testimony about his findings.

Alternatively, defendant asserts that trial counsel was ineffective by failing to ensure the discovery of those photos, and by failing to undertake a competent investigation into the validity

of the prosecution's medical evidence regarding "Shaken Baby Syndrome" ("SBS") and "Abusive Head Trauma" ("AHT"). Defendant contends that, if trial counsel had researched the People's theory of the case as it became apparent, he would not have relied on the testimony of only one expert, Dr. Cassin, to testify on defendant's behalf. Further, defendant asserts that Dr. Cassin was retained before trial counsel even before he had enough evidence about the case to make an informed, strategic decision that Dr. Cassin was the best available choice for his defense. Defendant argues that trial counsel had other avenues available to obtain experts, such as through attorney Imran Syed of the Michigan Innocence Project, but neglected to pursue them.

Defendant contends that this is because trial counsel had accepted the People's theory that the fatal injury was caused by defendant hours before Damian was hospitalized. Defendant argues that defense counsel failed investigate his primary defense: that Damian was accidentally injured by falling from a high stool. Instead, defendant argues that trial counsel proceeded on a theory of involuntary manslaughter. Defendant contends that if trial counsel had explored the possibility the bar stool had caused the fatal injury through biomechanics engineers, and had considered that the fatal injury could have been more than a few hours old through Dr. Dravovic and the missing autopsy photos, then there is a reasonable probability that the trial outcome would have been different.

Defendant's third and final point is that trial counsel erred by failing to request additional redactions in the transcript of his police interview. Defendant asserts that the detective's statements to defendant that Damian was suffering from SBS was inadmissible hearsay since the detective was not a medical professional.

B. The People

The People first deny that a Brady violation occurred. The People contend that it did not have possession of the neuropathology photos until after trial. Therefore, it could not have suppressed them in bad faith.

Second, the People contend that the photos were not exculpatory or material to the point where they would change the outcome of the trial. The People assert that Dr. Dragovic's testimony at the Ginther hearing after having seen the photos did not substantially differ from Dr. Cassin's testimony at trial. Both of them agreed that Dr. Spitz failed to account for the effect that the surgical intervention had on the brain hemorrhaging when he testified. Therefore, the People argue that the jury heard the same evidence from Dr. Cassin without the photos that it would have heard from Dr. Dragovic with the photos.

Finally, the People contend that defendant has waived his right to challenge the police interrogation transcript as hearsay evidence on appeal.

IV. Law and Analysis

A. Brady Violation

A *Brady* violation is established when “(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material.” *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 *reh den* 495 Mich 998; 845 NW2d 518 (2014) (citation omitted). Evidence is “favorable” to the accused if it is exculpatory, or impeaching. *Id.* The defendant does not need to show that the favorable evidence was suppressed in bad faith to establish a constitutional due process violation, because “[t]he government is held responsible for evidence within its control, even evidence unknown to the prosecution, without regard to the prosecution's good or bad faith.” *Id.* (citation omitted). To prove materiality, a defendant need not show “by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the

defendant's acquittal." *Id.*, quoting *Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555, 1566; 131 L Ed 2d 490 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 US at 434; 115 S Ct at 1566. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.*

Having thoroughly reviewed the record, the Court is satisfied that defendant has met his burden to show that a Brady violation has occurred. Although the Court does not find that it was intentional on the part of the People, there can be no doubt that the close-up photos Dr. Spitz took during his examination of the brain injury are material to his testimony. They are a part of the body of knowledge that he relied on to conclude that the fatal injury was intentional rather than accidental. These photos, admitted as Defendant's Exhibits C- E, and G - L (L being a compilation of photos), represent the evidence "necessary to corroborate the accuracy of [Dr. Spitz's] reported conclusions," which Dr. Dragovic noted was missing from the evidence he reviewed in preparation for defendant's appeal. See Defendant's Motion, Appendix I. Thus, Dr. Spitz's testimony was influenced in no small part by the information depicted in these photos, and that information was not available to defendant, his defense counsel or his expert until after trial.

The People argue that the absence of these photos did not materially prejudice the outcome of the trial. The People contend that Dr. Cassin adequately testified contrary to Dr. Spitz at trial. He testified that the bleeding and bruising on the right side of the *scalp* was due to the surgical intervention, as opposed to the injury itself as Dr. Spitz had indicated. See Trial

Transcript ("TT"), Vol. V at 91-92. He also testifies that there is bleeding where Dr. Spitz cut into the scalp. *Id.* at 92. Dr. Cassin also testified that the 20 or 30 seconds of shaking could contribute to hemorrhaging but would not have caused the bruising. *Id.* at 100 to 102. Thus, the People contend that Dr. Cassin's testimony sufficiently impeached Dr. Spitz's conclusion that the injury was intentional without the benefit of the newly discovered photos, and that Dr. Dragovic's testimony would only be cumulative at this point.

However, that is not entirely accurate. With the aid of these photos, Dr. Dragovic was able to form opinions and testify thereto about bruising and bleeding depicted on the surface of the *brain*. Dr. Dragovic could see the discrete areas of bruising more easily than Dr. Cassin could them, see *id.* at 91-92. As such, Dr. Dragovic testified that the two areas of bruising could have resulted from one single event if the head had movement.

He also concluded that the right side brain swelling and hemorrhaging was due to surgical intervention, not the bruising. Dr. Cassin, on the other hand, could not determine the extent of the impact that surgery had on the injury because he did not see these photos. Dr. Dragovic noted that X-rays taken before the surgical intervention showed even swelling on the right and left side of the brain. In his opinion, this tended to undermine Dr. Spitz's conclusion that the fatal brain trauma was an intentional injury that occurred in the hours prior to Damian's hospitalization; whereas Dr. Cassin agreed with Dr. Spitz that the fatal head trauma had to have occurred within hours of Damian becoming unresponsive.

Therefore, Dr. Dragovic's testimony cannot be considered cumulative to Dr. Cassin's. The information provided by these photos when interpreted by a qualified neuropathologist would likely have materially changed how the jury viewed the relationship between defendant's

conduct and Damian's death. The nondisclosure may have been unintentional, but it was not harmless error. Therefore, a new trial is warranted.

B. Ineffective Assistance of Counsel

Although grounds for reversal have already been found due to non-disclosure, the Court also agrees that trial counsel was ineffective for failing to investigate alternate theories of causation. A defendant proves ineffective assistance of counsel by showing that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "The question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law. *Id.* at 47.

The record here shows that trial counsel proceeded on a theory of involuntary manslaughter throughout the investigation and litigation of this case, on the "hope" that evidence to support it would surface throughout the trial. See TT, Vol II at 186. Trial counsel and Dr. Cassin both presumed that the fatal injury occurred within hours of Damian's hospitalization. When asked if the fall from the high stool could have caused the more serious injury, Dr. Cassin agreed with the People: he testified that if Damian's mother's testimony that Damian acted normally after falling, then that event would have to be ruled out as the cause of the most serious brain injury. See TT, Vol V at 110 – 111. Dr. Cassin testified that based on the severity of the injuries, Damian would have to have been symptomatic immediate after they occurred. *Id.*

This testimony effectively negated one prong of trial counsel's "two-pronged" defense: namely, that nothing defendant did caused or contributed to Damian's death. If trial counsel had

known Dr. Cassin planned to testify that way, then it was objectively unreasonable to have him testify.

Moreover, there is no evidence that trial counsel availed himself of any alternative experts. Had trial counsel sought out other opinions sooner, he might have obtained Dragovic's contrary opinion sooner. Dr. Dragovic testified at the *Ginther* hearing that Damian could have been asymptomatic immediately after falling from the bar stool without ruling that out as the blunt force trauma that caused death. Dr. Dragovic testified (with the benefit of the neuropathology photos) that if the bleeding began slowly from very thin vessels right after the fall, it would have taken time for Damian's symptoms to develop. Dr. Dragovich also testified as to the noticeable absence of any physical evidence that defendant shook Damian forcefully enough to cause fatal brain trauma. Finally, he testified that Dr. Spitz failed to take steps in the autopsy to determine how old the brain bruises were, which would have helped determine cause of death from both a pathological and biomechanical standpoint.

All of this information would have supported defendant's position that he did not handle Damian in a way that caused death. That was the defense that defendant wanted to pursue. The evidence does not support that trial counsel made a legitimately informed, strategic decision to abandon that avenue of defense. See e.g., *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015). Accordingly, defendant's motion for a new trial is granted.

V. Conclusion

For the reasons set forth above, defendant's motion for a new trial is GRANTED.
Pursuant to MCR 2.602(A)(3), this *Opinion and Order* reopens this case.

IT IS SO ORDERED.

JENNIFER FAUNCE
CIRCUIT JUDGE

DATED: January 5, 2016

JAN - 5 2016

Hon. Jennifer M. Faunce
A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: *Stefanie Lund* Court Clerk

Joshua R. Van Laan, Assistant Prosecuting Attorney
Erin Van Campen, Assistant Appellate Defender