STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL NATHAN DUFRESNE,

Defendant-Appellant

/

No. 273407

File No. 06-2597-FC

(On appeal from Circuit Court for Emmet County; No. 06-2597-FC; Hon. Charles Johnson)

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/

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL (AFTER REMAND)

ORAL ARGUMENT REQUESTED

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BASIS OF JURISDICTION OF THE COURT OF APPEALS

Defendant-Appellant adopts the statement of the basis of jurisdiction in his original brief.

This Court has jurisdiction of this appeal as an appeal by right pursuant to MCL 600.308(1)(a); see MCR 7.204(A)(1), MCR 7.204(A)(2)(a), and MCR 6.425(F)(3).

STATEMENT OF QUESTIONS PRESENTED

IV-B (SUPP). DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR NEW TRIAL BASED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO OBJECT TO THE ADMISSION OF EVIDENCE THAT DEFENDANT WAS INVOLVED IN A WHITE SUPREMACIST GROUP INVOLVED IN THE MURDER OF THE FAMILY OF A FEDERAL JUDGE?

The trial court said "no".

Defendant-Appellant says "yes".

IV-C (SUPP). DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR NEW TRIAL BASED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO OBJECT TO THE ADMISSION OF TESTIMONY BY TROOPER ARMSTRONG REGARDING THE CREDIBILITY OF THE COMPLAINANT'S ALLEGATIONS?

The trial court said "no".

Defendant-Appellant says "yes".

STATEMENT OF FACTS

Defendant-Appellant adopts the statement of facts in his original brief. Facts related to the proceedings on remand will be included with the arguments.

ARGUMENT

IV-B (SUPP). DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR NEW TRIAL BASED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO OBJECT TO THE ADMISSION OF EVIDENCE THAT DEFENDANT WAS INVOLVED IN A WHITE SUPREMACIST GROUP INVOLVED IN THE MURDER OF THE FAMILY OF A FEDERAL JUDGE?

This Court reviews a claim of ineffective assistance of counsel as a mixed question of fact and law; it reviews a trial court's factual findings for clear error and makes a *de novo* determination if the facts constitute ineffective assistance of counsel, *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant moved for a new trial pursuant to this Court's order of remand. An evidentiary hearing was held at which Defendant's trial attorney (Bryan C. Klawuhn) testified. After allowing the parties to submit post-hearing briefs, the Court denied the motion in a written opinion, stating in part:

> During voir dire, attorney Klawuhn brought up Defendant's membership in a white supremacy organization called the "creativity movement". During the *Ginther* hearing, attorney Klawuhn explained why he did this, as follows:
>
> > "(by Mr. Klawuhn) . . . And the reason I did is because whenever you have an issue, in my opinion, like that, be it race or political motivation, or whatever, especially with regards to what Joel and Angie [the complainant] were doing, I couldn't risk having someone on the jury who would stop listening the second they heard creativity

> movement or white supremacy. And there was a gentleman sitting I think the third seat down during voir dire who actually became very upset when he found out about it. And I couldn't risk having that kind of guy on the jury and stops listening once he hears creativity movement. So, yes, the short answer to your question is, yes, I did bring it up during voir dire for that reason."
>
> [*Ginther* hearing, p 5]

In further testimony, attorney Klawuhn explained that he did not file a motion seeking to keep Defendant's membership in the creativity movement out of evidence for two reasons. First, he felt that it was an integral part of the story of the relationship between Defendant and the victim. Second, he believed that W[redacted]'s willing participation in certain white supremacist activities could be used to discredit her. [*Ginther* hearing, p 6]

Also, attorney Klawuhn testified that he was aware that Defendant's membership in a white supremacist organization was something that had been publicized locally in the newspapers [*Ginther* hearing, p 17]. This represents another valid reason supporting his trial strategy decision to deal with this issue in voir dire.

> "Where defense counsel recognizes and candidly asserts the inevitable, he is often serving his client's interest by bringing out the damaging information and thus lessening the impact."
>
> *People v Wise, 134 Mich App 82, 98; 351 NW2d 255 (1984)*

Given the local publicity, it was arguably attorney Klawuhn's duty to ascertain if any prospective juror was aware of Defendant's white supremacy activities, and if so, whether the juror could put this knowledge aside to give Defendant a fair trial. It is also arguably inevitable that the white supremacy involvement would come out at trial. The Court finds attorney Klawuhn's handling of this matter to be effective assistance, well within the wide discretion afforded to counsel concerning matters of trial strategy.

b. Failure to object - Detective White-Erickson.

Detective White-Erickson and Trooper James Armstrong, both of the Michigan State Police, were the primary

investigating officers on this case. Detective White-Erickson testified at trial concerning her involvement in various aspects of the investigation. During her direct examination, she testified as follows:

> "Q (by Mr. Findlay) Before this incident involving Angela W[redacted] arose, were you personally aware of any investigation regarding the Defendant?
>
> A (by Detective White-Erickson) I was asked by the FBI to assist them in an investigation.
>
> Q What was the nature of the investigation?
>
> A That investigation had to do with the creativity movement.
>
> Q And do you know what the status of that was at that time or where that is now?
>
> A At the time that the FBI asked me to assist them, which is to gather some information concerning the Defendant, and that was the time that the Judge's family in Chicago had been murdered. And so they were sort of checking out all the people that were directly associated with the creativity movement."
>
> [II Tr 106]

At the *Ginther* hearing, attorney Klawuhn was asked about this testimony. He indicated that he had no independent memory of it. He also testified that while he had reviewed the Defendant's Motion for a New Trial, prior to testifying, he had not reviewed the trial transcripts or anything else about the trial.

Concerning the testimony by Detective White-Erickson, he stated:

> "A (by Mr. Klawuhn) Do I have independent memory as I sit here now? No, but I believe that it was testified to."
>
> Q (by Mr. Skinner) Okay. Do you-sitting here today, do you find anything objectionable about that?
>
> A Yeah, I would say that I probably should have objected at trial. [*Ginther* hearing, p 9]

Klawuhn then goes on to refer to this as "a trial

objection that I missed".

As the Michigan Supreme Court has noted:

> "We evaluate defense counsel's performance from counsel's perspective at the time of the alleged error and in light of the circumstances. *Strickland, supra at 689* Thus, counsel's words and actions before and at trial are the most accurate evidence of what his strategies and theories were at trial."
>
> *People v Grant*, 470 Mich 477, 487; 684 NW2d 686 (2003)

Given attorney Klawuhn's testimony that he did not review the trial transcript and did not remember many details of the trial at the *Ginther* hearing conducted over a year later, his testimony that he "probably" should have objected bears little weight.

Sound trial strategy does not require the trial attorney to make every possible objection. To the contrary, it is often proper strategy to refrain from objecting excessively as this may annoy the jury or cause them to believe that counsel is keeping something from them. Thus, counsel may appropriately choose to lodge objections only in situations where improper and highly prejudicial evidence must be excluded.

While probably irrelevant and thus inadmissible, nothing in the Detective's testimony remotely suggests that Defendant himself was personally involved in the murder of a judge's family. Defendant was an admitted leader in the creativity movement. The white supremacy beliefs of the creativity movement are so repugnant, that learning that others in the movement were suspects in a murder investigation hardly elevates the "guilt by association" impact on Defendant. The fact that the jury convicted Defendant of some counts but acquitted him as to others further tends to show that the jury was not inflamed by any improper prejudice against him.

Viewed according to the requisite objective standard of reasonableness, it was not unreasonable not to object to the Detective's testimony that was relatively innocuous in the context of the other facts of this case. The Court finds that the failure to object as to the Detective's testimony does not establish ineffective assistance of counsel. (Opinion of Judge Johnson, pp 3-5)

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms. In doing so, a defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. A defendant must also show that he was prejudiced by his attorney's errors to the extent that he was denied a fair trial and that a reasonable probability exists that, but for those errors, the result of the proceeding would have been different, *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

WHITE SUPREMACIST VIEWS GENERALLY

The subject of "offensive" and "not mainstream" views was first mentioned to the jury in the prosecutor's voir dire (I Tr 48). Defendant then explored the subject in greater depth in jury selection.

Evidence showing a defendant's involvement in white supremacist activities is "certainly inflammatory", *United States v Felton*, 417 F3d 97 (CA 1, 2005). A review of the preliminary examination testimony of Angela W[redacted] (the complaining witness) and of Plaintiff's Exhibit 9 (a recording of a lengthy telephone conversation between her and Defendant) does not disclose any clear references to white supremacist or racist views or organizations. Nothing in the record suggests that references to white supremacist views or involvement in white supremacist organizations was

relevant to the issues to be decided at trial. The information regarding the Cadillac "skinhead" meeting/party could have been introduced without reference to such views without, in any way, reducing its probative value for the prosecution. Counsel's claim that Ms. W[redacted]s prior claim that she was forced into involvement could be impeached with her involvement in prisoner/women's group activities lacks merit because extrinsic impeaching evidence could not be admitted on a collateral matter, MRE 608(b).

The only claim that is not undermined by the established facts is counsel's claim that something might "come out" and taint a juror for whom such information would be critically prejudicial. This is not a rational strategic purpose in light of the likely prejudice engendered by disclosing the information to the entire jury. The likelihood of prejudice was much greater than the likelihood that a well-cautioned witness would disclose such information "accidentally" and thus taint the jury. This was a serious error. Defendant submits that the information available to this Court rebuts the presumption that counsel engaged in a rational trial strategy. The error was reasonably likely to have altered the result in this trial, which was (fundamentally) a credibility contest.

TESTIMONY BY DETECTIVE WHITE-ERICKSON THAT "SHE HAD INVESTIGATED HIM AS PART OF AN FBI INVESTIGATION INTO THE ENTIRE MOVEMENT FOLLOWING THE MURDER OF A JUDGE'S FAMILY IN CHICAGO"

Detective White-Erickson was questioned and testified, on direct examination:

> Q. What was- did you have knowledge of the Defendant prior to this incident?
>
> A. I had knowledge of him. Correct.
>
> Q. Were you actively pursued in investigating him or trying to apprehend him on any type of crime or offense?
>
> A. I was never asked to apprehend him. No.
>
> Q. Before this incident involving Angela W[redacted] arose, were you personally aware of any investigation regarding the Defendant?
>
> A. I was asked by the FBI to assist them in an investigation.
>
> Q. What was the nature of that investigation?
>
> A. That investigation had to do with the creativity movement.
>
> Q. And do you know what the status of that was at the time or where that is now?
>
> A. At the time that the FBI asked me to assist them, which is to gather some information concerning the Defendant, and that was the time that the Judge's family in Chicago had been murdered. And so they were sort of checking out all of the people that were directly associated with the creativity movement. (II Tr 105-106)

She testified that there was no police conspiracy to "nail the Defendant" (II Tr 106).

The failure to object to this testimony was a serious error. Disclosing the fact that Defendant was involved in a white supremacist organization or held white supremacist views was unlikely to have nearly the prejudicial impact that this disclosure had. Disclosing Defendant's possible involvement in such an offensive crime (the killing of a judge's family) was likely to

have a siginificant impact in jurors' views of his likely involvement in these alleged offensive crimes. This information could easily have persuaded jurors to disregard any reasonable doubts in deciding Defendant's guilt (so that it could protect persons from the dangerousness exhibited in the murder of the Judge's family).

In testifying, counsel did not claim that he had any strategic reason for not attempting to preclude the introduction of this evidence. He made no attempt to counter the impact of the testimony by asking if the witness was aware that the killer of the Judge's family had no connection to Defendant, to the "creativity movement", or to any white supremacist group (see attached submitted in the trial court). The FBI knew within a matter of days that the murder of the Judge's family was entirely unrelated to any white supremacist movement. Counsel had no rational strategic purpose for his inaction.

It is reasonably probable that the failure to exclude this highly inflammatory evidence had an effect on the jury's verdict. The evidence was extremely inflammatory (so long as the jury was kept unaware that it was grossly and prejudicially misleading). No significant inference can be drawn from the jury's verdict, convicting Defendant on nine counts but acquitting him on three others, except that it must not have found the evidence overwhelming. This is certainly the type of case (relying almost exclusively on the credibility assessments of the accuser and of Defendant) in which prejudice against a defendant based on an

assessment of his character might play a key role.

The trial judge erred by concluding that counsel did not act unreasonably by failing to object to the admission of this testimony. Had counsel planned to show that Detective White-Erickson so lacked candor that her credibility was suspect, failing to object would have made sense. Since, however, he did nothing to counter or blunt the impact of her misleading testimony, he should have moved to strike the testimony and instruct the jury to ignore it. The prosecution was able to successfully portray Defendant as a danger to society; this was highly prejudicial. The impact of the testimony presented here was as great as the impact of an accusation that a defendant was a member of a violent street gang; such testimony creates "strong prejudice", *People v Patterson*, 154 Ill2d 414, 458; 610 NE2d 16 (1992).

IV-C (SUPP). DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR NEW TRIAL BASED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO OBJECT TO THE ADMISSION OF TESTIMONY BY TROOPER ARMSTRONG REGARDING THE CREDIBILITY OF THE COMPLAINANT'S ALLEGATIONS?

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Defendant moved for a new trial pursuant to this Court's order of remand. An evidentiary hearing was held at which Defendant's trial attorney (Bryan C. Klawuhn) testified. After allowing the parties to submit post-hearing briefs, the Court denied the motion

in a written opinion, stating in part:

> The testimony from Trooper Armstrong that gives rise to this assertion was simply testimony by him that he would have followed up and investigated any potentially exculpatory information concerning Defendant. Attorney Klawuhn, with obviously no memory of the testimony in question, and reliance on defense counsel's brief summary of it, agreed that "I guess I find that objectionable."
>
> Nothing in the briefing to this Court explains why this was objectionable. Defendant's Brief on Appeal in the Court of Appeals argues that this involved Trooper Armstrong improperly vouchimng for the credibility of other witnesses. Defendant does this by mischaracterizing Armstrong's testimony as though it involves others as follows:
>
> > "Trooper Armstrong testified that the police tried to do the best job they could in investigation and to try to investigate as fully as possible . . ." [Defendant's Brief on Appeal, p 22]
>
> The testimony of Trooper Armstrong in question involved him discussing his investigation. At times he did use the plural pronoun "we", i.e., "we tried to do the best job we can in investigating and try to investigate as fully as possible." The specific testimony on redirect examination, was concerning Armstrong's review of Defendant's taped telephone calls from the jail. Trooper Armstrong gave the following testimony:
>
> > "Q (by Mr. Findlay) Just to give you a hypothetical, if you heard the Defendant say so and so has proof of my innocence, would you check that out?
> >
> > A (by Trooper Armstrong) Yes I would."
>
> Nothing about this question and answer constitutes the witness improperly vouching for the credibility of others.
>
> Attorney Klawuhn rightly did not object to this testimony. There is nothing concerning this testimony which establishes a failure to provide Defendant with effective assistance of counsel. (Opinion of Judge Johnson, p 7)
>
> On direct examination, Trooper Armstrong testified:

> Q. What was the purpose in you know the people that you contacted, the other things that you did during your investigation, what's the purpose of that?
>
> A. Well, I guess you've got a couple different purposes. Certainly, we try to do the best job we can in investaigation and try to investigate it as fully as possible, and document things, and talk to people to substantiate the fact that-you know, the facts in the case if we can, if it's possible.
>
> Q. Are you looking for evidence that only evidence that substantiates the case, or are you looking for evidence of exculpatory nature?
>
> A. It can go either way. I mean different cases- I've had cases in the past that you know accusations were made and after you look into a little bit, you come to find out that it probably didn't happen the way that it was told to us. So when we go out to do these interviews, we're looking for information. It may help or it may hurt the case. (I Tr 181)

In the instant case, little or no evidence on the key issue of consent was produced by either side, outside of the testimony of the complainant and of Defendant. The clear implication of the testimony of Trooper Armstrong was that police investigated the case to determine if complainant and Defendant were credible, and that their thorough investigation gave them no cause for not proceeding with the prosecution. Even though the witness never explicitly claimed that he believed the complainant to be credible, it is hard to posit any other purpose for the questions being asked. Counsel should have objected on the basis of relevance. The practice of a police officer in making thorough evenhanded investigations does not make Defendant's guilt of these charges any more or less probable. See MRE 401.

Counsel's failure to object to the introduction of this evidence was error. Counsel admitted that there was no strategic

purpose for the failure to object. Defendant concedes that, standing alone, this error was not reasonably likely to affect the result of the trial. Defendant asks, however, that this error be considered in conjunction with the error in the admission of evidence of Defendant's involvement in a white supremacist organization and possible involvement in the murder of a judge's family in finding that Defendant was prejudiced.

RELIEF REQUESTED

Defendant-Appellant prays that this Honorable Court reverse his convictions and remand for a new trial.

June 23, 2008

Patrick K. Ellmann
Attorney for Defendant-Appellant

The New York Times

National

Evidence Links Man Who Killed Himself to Chicago Murders

ARTICLE TOC

By

Published: March 10, 2005

HICAGO, March 10 - An unemployed man whose delusional, decade-long legal battle against doctors, lawyers and the government was dismissed last year by a federal judge shot himself in the head on Wednesday night, leaving behind letters in which he admitted killing the judge's husband and mother.

RELATED

Bart A. Ross, 57, sued the federal government and others for $1 billion, saying they persecuted him with "Nazi-style" and terrorist tactics as he pursued a medical malpractice claim stemming from the severe disfigurement of his cancerous jaw. In the van in which he had been living, he left a suicide note that linked him to the killings. He also sent a letter to a television station here, saying he had planned to kill the judge, Joan Humphrey Lefkow of United States District Court, but "had no choice but to shoot" her loved ones when they discovered him hiding in the basement.

Most

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Last month, Judge Lefkow found her husband, Michael, and her mother, Donna Humphrey, shot to death in the basement of their Chicago home. The judge , who serves on the United States District Court, was the target of an assassination plot for which a white supremacist was convicted last year.

"I regret killing husband and mother of Judge Lefkow as much as I regret that I have to die for the simple reason that they personally did to me no wrong," said the handwritten missive on the back of Mr. Ross's court papers and signed with his name, according to the Web site of the NBC station, WMAQ. "After I shot husband and mother of Judge

Lefkow, I had a lot of time to think about 'life and death' - killing is no fun, even though I knew I was already dead."

Mr. Ross's link to the killings at Judge Lefkow's home emerged on Wednesday when a police officer in West Allis, Wis., noticed a suspicious vehicle with Illinois license plates parked near a school, Chief Dean Puschnig of the West Allis Police Department said at a news conference today. When the car moved, the officer followed it, then pulled it over after noticing it did not have tail lights.

As the officer approached the vehicle, a single gunshot was fired from inside, exiting the window close to where the officer was standing.

"He died from a self-inflicted gunshot wound to the head," Chief Puschnig said, referring to the single occupant of the vehicle. He said that when the vehicle was later searched "our investigators discovered some material that led us to believe that this man could be involved, or had some vital information, to the Lefkow homicide investigation."

Chief Puschnig said the officer did not see the man writing a note but had noticed him "doing something" before the shot went off.

Until Wednesday night, the authorities had focused their investigation of the killings of Judge Lefkow's family largely on white supremacists who had vilified the judge and plotted her assassination.

Neighbors of Mr. Ross described him as an angry loner whose huge black dog often terrorized children on their quiet block, and recalled him soliciting support for his lawsuit several years ago at a neighborhood meeting. Facing eviction, he had also recently asked some for money. Lawyers involved in the case, in which Mr. Ross represented himself despite lacking any legal education, said his physical and mental condition had deteriorated through the years and that they had frequently fretted for their own safety around him.

In a recent letter to President Bush, Mr. Ross threatened that someone would have to pay if he did not get justice.

"Because he was delusional, he kept seeing bigger and bigger conspiracies," said Thomas L. Browne, who represented one of the law firms targeted by Mr. Ross and immediately thought of him when he heard about the Lefkow killings. "We really didn't think he was going to do anything violent, but he was getting less and less stable with all of these pleadings."

Christine Hauser contributed reporting from New York for this article.

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