STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL PARKS,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 171408
LC No. 93-1000

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of assault with intent to murder, MCL 750.83; MSA 28.278, two counts of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He appeals his convictions, for which he was sentenced to two years' imprisonment for felony-firearm, followed by concurrent terms of fifteen to thirty years for assault with intent to murder, and five to ten years on each of the assault with intent to do great bodily harm convictions. We affirm.

I

On September 7, 1992, at about 7:00 p.m., defendant went to see an ex-girlfriend, Tatiana Slay, who was moving some things out of a house. Slay refused to talk to defendant. After being asked to leave and retrieving a gun from his car, defendant shot at Slay and at the three people who were helping her move. Defendant turned himself in to the police approximately four months later.

Defense counsel stated in opening statement that the only contested issue, and the ultimate issue, was defendant's intent. He argued that defendant did not intend to kill anybody, but acted in self-defense.

Tatiana Slay testified that she had dated defendant and lived with him on and off for about a year, until September 1992. They lived together in a house Slay rented with her two young children on Rosemary Street in Detroit. Over defense counsel's objection on relevance grounds, Slay was permitted to testify that defendant had previously assaulted her when she lived with him. Defense counsel again objected to the testimony as being impermissible prior bad acts testimony, and argued

* Circuit judge, sitting on the Court of Appeals by assignment.

there was no foundation or documentation that any of the prior incidents were reported. The jury was excused. The prosecution argued that the evidence was not offered to show character or actions in conformity therewith, but was offered to show intent, which defense counsel placed in issue in opening statement. The court ruled that the testimony was relevant to intent but noted that "we're in a minefield, no question about it," and limited the testimony to one incident only, which occurred within a month of the instant shooting. The court also ruled that the defense opened the door by asserting in opening statement that the prosecution could not prove their case because they could not show intent, and added that defense counsel could cross-examine on the issue.

Slay then testified that approximately one month before the shooting, defendant threatened her with a gun, told her if he could not have her, nobody else would, and said that he was going to shoot Slay and himself. Slay further testified that defendant put the gun to a pillow and made her get on her knees and beg for her life and promise she would not leave him. Slay testified that after this incident, defendant would not let her out of his sight. One morning, while Slay was on the phone with one of her sisters, defendant hung the phone up and, each time the sister called back, defendant again hung the phone up. Slay testified that her sister got worried and called another sister, who came to see what was going on. Defendant and Slay's sister had words, and defendant tried to throw Slay's sister out of the house. Slay's sister took Slay's children across the street and called the police. Defendant testified that she informed the police what had happened but did not file a complaint. Slay and her children left the Rosemary Street house. Slay testified that defendant stayed there another week, calling her from that house and asking her to return.

After Slay's neighbors told her that defendant had moved out, and before the incident in question, Slay returned to the house to get her larger belongings, and later returned on the date in question, September 9, 1992, to retrieve the last of her belongings. Her brother, Darryl Wilson, and two friends, Stanley Brown and Yvonne Hicks were helping her move. Slay testified that defendant pulled up to the house, blocked the driveway, and said he wanted to talk to her. Slay responded that she had nothing to say to him. Slay's brother and Brown both asked defendant to leave. Slay got into her car. Slay testified that defendant went to his car and came back with a gun, and that she saw him fire the gun at Brown, who was standing on the sidewalk less than a full car-length away from defendant. Slay testified that she saw defendant point the gun at Brown and fire two or three shots at him, that those were the first shots fired, and that the only exchange she heard between Brown and defendant prior to the shooting was Brown asking defendant to leave and telling him that Slay did not want to talk to him. Slay testified that a bullet struck Brown's back pocket and wallet. After the incident, Slay saw Brown's wallet.

Slay testified that defendant then walked over to the car she was in and shot at her through the open front-seat passenger window. Slay testified that defendant pointed the gun at her, that she saw the barrel of the gun, raised her arm to protect her face, and that defendant fired at least two or three shots at her. Slay testified that either two bullets struck her arm, or one bullet entered and exited her arm. Another bullet struck the back of her upper thigh, as a result of her diving over her nephew, who was in the car with her at the time of the shooting.

Slay further testified that after she was shot, she crawled out of the driver's side door, tried to stand, but could not, and that defendant came over to her and pointed the gun to her head, the barrel being no more than six inches away. Slay testified that her brother threw something at defendant and that defendant then tried to fire at her brother, but the gun was empty. Slay testified that she knew the gun was empty because when defendant pulled the trigger, twice, nothing came out. Defendant then ran to his car and sped off.

Slay did not see defendant shoot at Yvonne Hicks, but saw that Hicks had been hit after they were both taken to the hospital. Slay testified that at no time during the incident did she see Brown, Hicks or Wilson with a gun. She did not threaten defendant in any way or hear any of the three persons helping her threaten defendant or move as if they had a weapon. Slay testified she spent at least two days in the hospital and that the bullet in her upper thigh remains lodged there.

Hicks' testimony was consistent with Slay's. Hicks testified that a bullet fired by defendant struck her in the breast and lodged in her arm. After she was shot, she saw defendant shooting into the car Slay and Slay's nephew were in, and she ran and called the police. She saw defendant shoot at Slay through the open car window. She was unsure how many shots she heard, but it was more than one.

Brown testified that three bullets fired by defendant hit him in the rear, but did not penetrate his wallet and calendar in his back pocket. He testified he did not threaten defendant and did not act as if he had a weapon, and that none of the people he was with had a weapon.

Wilson's testimony was also consistent with Slay's, but added that after he heard the shots fired at Brown, defendant started coming at him. Two more shots were fired and, at that point, Wilson retrieved a hammer from the trunk of his car and threw it at defendant after he saw defendant go toward the car Slay and Wilson's son, Slay's nephew, were in. Defendant then came at Wilson, pointing at Wilson's head. None of the shots fired struck Wilson, but he testified he heard "one go past my ear; that's how close we were."

During cross-examination, defense counsel questioned Slay regarding details, including the date and time, of the incident a month before this shooting, when defendant held a gun to Slay's head. Defense counsel then asked Slay whether she and defendant had had other disagreements while they lived together, to which Slay responded affirmatively. Defense counsel then elicited from Slay that after some of the disagreements, defendant had moved out and Slay later allowed him to return. Defense counsel asked Slay if before the incident in August 1992, she had ever called the police and whether she had police reports. Slay responded affirmatively, adding that she did not have them with her. Slay testified that she did not call the police after the August 1992 incident.

On re-direct, the prosecution asked Slay whether she was afraid of defendant prior to the threat, made with a gun, that he would kill her if she ever left him. Slay testified that defendant had been abusive before but had never threatened her with a gun. When the prosecutor asked Slay what the first instance of abuse was, defense counsel objected but only on grounds that the answer was unresponsive.

Slay testified without objection that she was afraid of defendant because quite often he woke her up at night and asked about her prior relationships while "playing" with a gun. Slay testified that she reported to the police calls defendant made to her after the shooting incident.

During a recess, the prosecutor stated that he intended to recall Slay and read police reports of prior incidents into the record. Defendant objected, and the trial court ruled that the reports were not hearsay because they were offered to rebut a claim of recent fabrication.

I

We first address several of defendant's arguments together.

We reject defendant's argument that the trial court improperly admitted the August 1992 prior similar act evidence to show that defendant had an assaultive character and acted in conformity therewith. The evidence was offered as relevant to intent, which defense counsel had both placed in issue and stated was the sole contested issue in opening statement. The admission of relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish conduct in conformity therewith. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The August 1992 incident was relevant to an issue other than propensity—defendant's intent in shooting Slay--and defendant has not shown that the probative value of this evidence was substantially outweighed by unfair prejudice. *Id*.

As to evidence of prior acts other than the August 1992 incident, many of the prosecutor's questions as to other incidents of violence by defendant toward Slay were in response to defense counsel's cross-examination of Slay. Defendant placed these incidents in issue, and defendant's only pertinent objection was on the basis of nonresponsiveness. Thus defendant's remaining objections to the prior acts testimony are unpreserved.

We also conclude that the trial court did not abuse its discretion in admitting the two police reports as non-hearsay. Because defense counsel had argued that the prosecution was trying to introduce incidents that had gone unreported until trial, the reports were admissible to rebut a claim of recent fabrication. MRE 801(d)(1)(B).

The prosecution concedes its failure to give defense counsel notice of its intent to use prior acts evidence as required under *VanderVliet*, 444 Mich at 88-89, which was decided one month before defendant's trial, but disagrees that defendant is entitled to reversal as a result. Under the circumstances presented here, we agree.

The purpose of the notice requirement adopted in *VanderVliet* and later codified in MRE 404(b)(2), which became effective June 24, 1994, is to "prevent[] unfair surprise and offer[] the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice." *VanderVliet*, 444 Mich at 89 n 4. The prosecution argues that, in light of defense counsel's having brought out on cross-examination additional allegations of defendant's assaultive behavior toward Slay, the defense can not claim surprise. We note that defendant did not object to the lack of notice, and

there is no indication in the record that defendant was either surprised or ambushed by the evidence presented. In the final analysis, if there was error it was harmless given the overwhelming evidence of defendant's guilt. *Vanderlinder, supra*.

III

Defendant further argues that he was denied a fair trial by the prosecutor's conduct; denied due process by the prosecutor's allowing false testimony from state witnesses, presenting evidence falsely, and asking improper questions; and denied a fair trial by the trial court's failure to control the proceedings.

In regard to prosecutorial misconduct, we have already discussed defendant's claim of failure to provide notice of intent to use similar acts evidence. In addition, defendant argues the prosecutor denigrated defense counsel's strategy, commented on lesser included offenses, vouched for the credibility of the principal complainant, disparaged the defendant, and improperly appealed to the jury's sympathy by repeatedly referring to the complainant's nephew and her children, who were not victims in this case.

The test for prosecutorial misconduct is whether defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 ns 5-7; 531 NW2d 659 (1995). Where no objection is made, reversal is unwarranted unless the resulting prejudice is so great that it could not have been cured by a timely requested instruction. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995).

A trial court has the duty to control the proceedings and to limit the evidence and the arguments of counsel to relevant and material matters. MCL 768.29; MSA 28.1052; see also *People v Spencer*, 130 Mich App 527, 539-540; 343 NW2d 607 (1983). This claim of error is reviewed for abuse of discretion. *Spencer, supra* at 540.

During closing, the prosecutor argued that certain arguments made by defense counsel in his summation were red herrings designed to distract the jury from the real issues. Defendant did not object, but now claims error. The prosecutor's comments were made in response to defense counsel's argument that alleged inconsistencies in the details of the witnesses' testimony should give rise to a reasonable doubt. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Specifically, these inconsistencies concerned whether the other victims were there to protect Slay or to help her move, whether Slay should have hidden inside the house, whether she should have called the police immediately, whether she knew Brown well, and the date on which defendant recovered his car from the police impound. Given this context, the prosecutor's comments were not improper.

During rebuttal argument, the prosecutor told the jury that they would not be given the option to convict defendant of the lesser offense of assault with intent to do great bodily harm with respect to Slay because "I think the evidence was clear on that witness stand that if he wanted to kill anybody out of those four people, it was Tatiana Slay." Defendant failed to object to this comment. We conclude that

any prejudice could have been cured by a timely objection, and that defendant was not denied a fair trial by the comment.

During closing, the prosecutor argued that Slay's testimony "about what happened on that day [when he threatened to kill her if she ever left him], I think, rang true for you what she said about this relationship she had with Mr. Parks." There was no objection. He also told the jury that, regardless of how many witnesses testified for each side, Slay's testimony should be believed because her testimony was "more credible and more powerful" than defendant's. Again, there was no objection. We conclude that these were comments on the evidence and not improper expressions of the prosecutor's knowledge or opinion. *Bahoda*, *supra* at 276-277, 282-283. Further, a prosecutor may comment on the credibility of witnesses, including prosecution witnesses, during closing argument, especially when the evidence is in conflict and the outcome will turn on the resolution of a credibility dispute. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992).

In a supplemental brief filed in pro per, defendant argues that the prosecution violated due process and a discovery order by failing to give defense counsel copies of police reports made by the various victims in advance of trial. At trial, the prosecution did not challenge defense counsel's representation that the prosecutor violated a discovery order dated February 18, 1993, which is missing from the lower court's file, requiring the prosecutor to disclose all witnesses' statements. Defendant argues this may sometimes be grounds for reversal. See *People v Pace*, 102 Mich App 522, 528-533; 302 NW2d 216 (1980). However, defendant did not ask for a mistrial nor did he ask that the statements be excluded on this ground. Rather, he asked for copies of the statements and for time to examine them and to prepare. Because after reviewing them counsel indicated that he was ready to proceed, any error in this regard has been waived.

Defendant also argues in pro per that the prosecutor committed misconduct by allowing Slay and an investigating police officer to testify falsely concerning the details of when things happened. A prosecutor's knowing presentation of false testimony may constitute grounds for reversal. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Here, however, there was no attempt to conceal inconsistencies in the testimony. Nor is there evidence that the witnesses were lying, or that the prosecutor knew that they were going to lie. See *People v McWhorter*, 150 Mich App 826, 831-832; 389 NW3d 499 (1986).

Defendant in pro per also claims that the prosecutor was trying to elicit the jury's sympathy by repeatedly asking a variety of improper questions. He further argues that the trial court failed in its duty to control the proceedings by allowing these allegedly improper questions. No objections were made to any of the references to a child being in the car with Slay at the time she was shot.

As to the prosecution's cross-examination of defendant, the question regarding his dating other women was triggered by defendant's own statement that problems in the relationship arose because he "was dating a lot of women then." There was no objection to the question regarding whether defendant thought that the people helping his ex-girlfriend move were there to protect her. There was also no

objection to the question whether defendant had staged a false break-in after moving his own things out of the house. The comment about the "bogus" defense was made in response to defendant's assertion that, although he had apologized to the other victims, he had not apologized to his ex-girlfriend for the shooting because she seemed so scared. Further, it is proper for a prosecutor to argue that based on the facts presented, a witness is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Lastly, there was no objection to the question whether defendant had a permit to carry a concealed weapon in his car. We conclude that these comments did not amount to prosecutorial misconduct denying defendant a fair trial. Further, the remarks could have been neutralized by a timely-requested instruction. The trial court did not violate its duty to control the proceedings, as defendant did not object to these comments and they were not improper given their context.

Defendant next argues that the trial court's failure to properly instruct the jury denied him a fair trial. Specifically, he argues it was error not to instruct on assault with intent to do great bodily harm regarding Slay where the jury was so instructed regarding Slay's three companions, and that it was also error to give a reasonable doubt instruction omitting the moral certainty language.

The prosecutor requested that the jury be instructed regarding the lesser offense as to Brown, Wilson and Hicks. Defendant opposed the giving of instructions on the lesser offense. The court granted the prosecutor's request over defendant's objection. Defendant did not then request that, if given at all, the instruction be given as to Slay as well. Thus, this issue has been waived. Defendant may not harbor error to be used as an appellate parachute in the event of jury failure. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

As to the reasonable doubt instruction, this Court has held that it is not error to give the revised standard jury instruction that omits the moral certainty language. *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991), cert den 505 US 1213; 112 S Ct 3015; 120 L Ed 2d 888 (1992).

Defendant next argues he was denied effective assistance of counsel at trial. Defendant did not move for a new trial or an evidentiary hearing on this basis. Therefore, review of counsel's alleged misconduct is limited to errors apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Defendant must show that there is a reasonable possibility that, but for the alleged error, the outcome at trial may have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens, supra* at 312, 314.

The errors alleged by defendant on appeal involve strategic decisions some of which, in hindsight, perhaps were not the best possible. However, in light of the overwhelming evidence of

defendant's guilt, we conclude that the errors did not have a reasonable probability of affecting the outcome. Thus, defendant's claims do not require reversal.

Defendant next argues that he is entitled to be resentenced since his fifteen to thirty year sentence for assault with intent to murder violates the principle of proportionality. The evidence showed that defendant demanded to speak with his ex-girlfriend and, when she refused, he shot at her and the people who were helping her move. The guidelines recommended a minimum sentence of between ten and fifteen years. A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and offender. *People v Milbourn*, 435 Mich 630, 656; 461 NW2d 1 (1990). In light of the seriousness of defendant's actions, and the fact that Slay was struck by two of defendant's bullets and the friends helping her move were shot at while nearby, we cannot conclude that defendant's sentence, which is within the guidelines, is disproportionate. Further, the court's reference to the guidelines was a sufficient articulation. *People v Broden*, 428 Mich 343; 408 NW2d 789 (1987).

Affirmed.

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard R. Lamb