STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL KEITH STRUNK,

Defendant-Appellant.

UNPUBLISHED
January 28, 1997

No. 181889

Livingston Circuit Court
LC No. 93-007594-FC

Before: Fitzgerald, P.J., and MacKenzie and A.P. Hathaway,* JJ.

PER CURIAM.

Defendant was charged with assault with the intent to commit murder, MCL 750.83; MSA 28.278, assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and habitual offender, third offense, MCL 769.11; MSA 28.1083. In separate trials, a jury found defendant guilty of assault with the intent to commit murder and habitual offender, third offense. The trial court sentenced defendant to twelve to thirty years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant argues that the prosecutor's actions during his closing argument constitute prosecutorial misconduct. We disagree. For allegations of prosecutorial misconduct, this Court examines the pertinent portion of the record below and evaluates the prosecution's conduct to determine whether it denied the defendant a fair trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Thus, this Court must read the prosecution's remarks as a whole and evaluate them in light of the defense's arguments and their relationship to the evidence introduced at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

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

First, defendant asserts that the prosecutor's comments on defense counsel's trial strategy were improper attempts to introduce facts not in evidence. As a general rule, arguments of the attorneys are not evidence, see, e.g., CJI2d 2.3, and otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Because the prosecutor's remarks addressed arguments made by defendant's attorney, we conclude that no error requiring reversal occurred on this point.

Second, defendant argues that the prosecutor's statements pertaining to trial strategy tended to denigrate defense counsel. It is improper for the prosecutor to engage in arguments that attack defense counsel because such arguments impermissibly shift the jury's focus from the evidence itself to defense counsel's personality. *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). Notwithstanding this general rule, the goal for an objection to such comments is to gain a curative instruction from the bench. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). Here, the trial court instructed the jury to disregard the prosecutor's remarks on this point, and defendant even agreed that this instruction was proper. Consequently, we conclude no error requiring reversal may be found on this ground.

Regarding defendant's challenges to the prosecutor's other conduct, defendant failed to object to the challenged remarks. As a result, these issues are unpreserved, and our determination is limited to whether a failure to review them would result in a miscarriage of justice. *People v Mooney*, 216 Mich App 367, 378; 549 NW2d 65 (1996). Our review of the challenged remarks convinces us that no miscarriage of justice occurred below.

II

Defendant next argues that the trial court abused its discretion by admitting various pieces of evidence. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). This Court reviews whether evidence was properly admitted for an abuse of discretion. *People v Crump*, 216 Mich App 210, 211; 549 NW2d 36 (1996).

First, defendant asserts that the trial court improperly admitted evidence pertaining to an assault that he committed on the day before the one which is the subject of the case at hand. The admission of other bad acts evidence is governed by MRE 404(b).[1] To be admissible under MRE 404(b), the proffered evidence must satisfy the following 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. *People v Cadle*, 204 Mich App 646, 655; 516 NW2d 520 (1994), remanded on other grounds 447 Mich 1009; 526 NW2d 918 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

Here, the prosecution offered the evidence of defendant's earlier assault to show that defendant had the motive and the intent to kill the victim. Thus, it was offered for a proper purpose. Furthermore,

we do not find that the evidence was more prejudicial than probative. Even though an inference that defendant was a bad person may arise from the introduction of the evidence, the trial court properly prevented this inference from arising with a limiting instruction. *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995). Therefore, we conclude that the trial court did not abuse its discretion in admitting the evidence.

Next, defendant asserts that the trial court improperly allowed medical testimony to be admitted even though the prosecutor failed to comply with a discovery order requiring him to provide defendant with all of the victim's medical records. Defendant's reliance upon *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980) to come to this conclusion is misplaced. Under current law:

> [T]he trial courts have discretion to deal with questions of noncompliance with discovery orders or agreements; that in fashioning remedies in the exercise of that discretion, there must be a fair balancing of the interests of the courts, the public, and the parties; and that the exclusion of otherwise admissible evidence is a remedy which should follow only in the most egregious cases. [*People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987).]

Here, the trial court exercised this discretion by suppressing the undisclosed document and allowing defendant additional time to prepare for the cross-examination of the doctor from whose records the undisclosed record came. This remedy properly balanced the interests put forth above and cured any prejudice that may have flowed from the document's nondisclosure. In contrast, a total suppression of all medical testimony would have put defendant in a better position at the expense of the public and the trial court. This Court does not favor such a result. See *Taylor*, *supra* at 487. Therefore, we conclude that the trial court properly used its discretion in an attempt to fashion a remedy for the situation before it.

Last, defendant asserts that the trial court improperly allowed the prosecutor's fingerprint expert to testify even though he was not the same person who was disclosed on the prosecutor's witness list. Pursuant to MCL 747.40a(3); MSA 28.980(1)(3), a prosecutor has the duty to provide a defendant with a list disclosing the witnesses whom the prosecutor intends to call at trial no later than thirty days before the start of the trial in question. Before trial, the prosecutor disclosed that she would call "Diane Crandall, MSP, Keeper of the Records, fingerprint expert or her designee." In other words, the prosecutor disclosed that she would be calling a state police fingerprint expert who was a record custodian, and the witness who testified fell within this description. Thus, we conclude that the prosecutor properly executed her duty under the statute. Furthermore, any prejudice that may have resulted from the substitution was cured by the trial court's grant of a continuance so defendant could prepare to meet the proofs from this witness. *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995).

III

Defendant argues that the trial court erred when it failed to suppress defendant's statement that "I should have just killed the bitch and then committed suicide" that he made in the presence of a police officer before being warned of his right to remain silent. We disagree. This Court conducts a de novo review of the record below to determine whether a defendant's statement was voluntary, but this Court reviews the trial court's findings of fact from the suppression hearing for clear error. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996).

The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. The right protects an accused from being compelled to testify against himself or provide evidence of a testimonial or communicative nature. *People v Burhans*, 166 Mich App 758, 761-762; 421 NW2d 285 (1988). Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). In the case at hand, the only dispute pertaining to the voluntariness of defendant's statement is whether it was the result of police interrogation.

Police interrogation is defined as "words or actions on the part of the police officers that they should have known were reasonably likely to elicit an incriminating response." *People v Honeyman*, 215 Mich App 687, 695; 546 NW2d 719 (1996) (Emphasis omitted). If one believed the testimony of the police officer who was present at the time that defendant allegedly made the statement, the statement was a spontaneous utterance which does not fall within the above definition. On the other hand, defendant presented testimony that the statement was elicited by a question by another officer. Nonetheless, this officer denied the allegation. Therefore, the trial court was left with a credibility contest between defendant's witness and the police officers. If the resolution of the matter involves a credibility dispute, this Court will ordinarily defer to the trial court, which has a superior opportunity to evaluate these matters. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). Accordingly, we conclude that the trial court did not clearly err when it resolved the credibility dispute in favor of admission instead of suppression.

IV

Defendant argues that the prosecutor's elicitation of testimony pertaining to defendant's non-cooperation from the arresting officer violated his right to remain silent. We disagree. Because defendant is raising an argument other than the one offered in his objection below, this issue is unpreserved. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Even though this issue has been rendered unpreserved by this change in arguments, this Court may still review it because defendant raised a constitutional challenge to the actions below. *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). Our review of the officer's testimony shows that he was merely describing defendant's state of intoxication and his ability to understand his actions while in this state of inebriation. Thus, no error on this ground can be found.

V

Defendant argues that the prosecutor presented insufficient evidence to show that he assaulted the victim with the intent to kill her or was an habitual offender. We disagree. This Court examines the evidence in a light most favorable to the prosecution to determine whether a reasonable jury would be able to find that all the elements of the charged offense had been proven beyond a reasonable doubt. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65, lv gtd 453 Mich 900 (1996).

In the case of assault with intent to commit murder, the intent element may be proven from the inferences drawn from any fact in evidence. *Id.* at 672. At trial, the victim and her daughter both testified that as defendant started the assault at hand, he said that "if I am gonna go to prison it is going to be for murder." Moreover, the evidence introduced below shows that defendant brought a six-inch kitchen knife with him when he confronted the victim. Last, an eyewitness to the latter portion of defendant's assault stated that defendant attacked the victim's car with a pickax twice as she was trying to escape the scene of the assault, and he provided that the second blow, which missed, was aimed at the driver's side of the car's windshield. By taking this evidence in a light most favorable to the prosecution, we are convinced that the prosecutor submitted more than enough evidence to support a finding that defendant had the actual intent to kill the victim at the time of the assault.

In regard to the habitual offender charge, the prosecutor has the burden of proof to show that the alleged prior convictions occurred and that the defendant was the person who committed them.[2] *People v Covington*, 70 Mich App 188, 191; 245 NW2d 558 (1976). Our review of the record below shows that the prosecutor introduced the following evidence: (1) certified judgments of sentence pertaining to defendant's prior convictions to show that the convictions occurred; (2) fingerprint cards, which are admissible under MRE 803(8), from these convictions; and (3) expert testimony that the fingerprints on these cards were identical to those taken from defendant while in court. Considering this evidence in a light most favorable to the prosecution, we are convinced that the prosecutor submitted sufficient evidence to support a finding that defendant was an habitual offender.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Amy Patricia Hathaway

[1] This rule provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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. [MRE 404(b)(1).]

[2] We disagree with defendant's assertion that the prosecutor must also prove the date upon which the underlying crime occurred because the fact that the prosecutor charged defendant as an habitual offender assumes the conviction of the underlying offense that gave rise to the supplemental charge. *People v Hastings*, 94 Mich App 488, 491; 290 NW2d 41 (1979). Defendant failed to provide us with any authority to the contrary, and we will not conduct a search to find it. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994). Even if the prosecutor had the duty to prove this date, the trial court did not abuse its discretion when it allowed the prosecutor to reopen her proofs to make this showing. *People v Shields*, 200 Mich App 554, 561; 504 NW2d 711 (1993).