

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ROWE MCINTYRE,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 196987
Chippewa Circuit Court
LC No. 95-06199-1-FH

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assault with a dangerous weapon, MCL 750.82; MSA 28.277. Defendant was sentenced to thirty-two to seventy-two months in prison, a sentence that was enhanced based on his status as an habitual offender, third degree, MCL 769.11; MSA 28.1083. We affirm.

Defendant first argues that he was denied his right to a fair trial because the prosecutor introduced improper character evidence in violation of MRE 404(b) and MRE 608. While ordinarily review is foreclosed where the claimed error is unpreserved, see *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994), we reach the merits of defendant's claim because its resolution is necessary for a determination of his other claims, namely, ineffective assistance of counsel. On direct as well as cross-examination, Undersheriff Savoie testified that he was "familiar" with defendant. Defendant now argues that this was evidence of prior bad acts under MRE 404(b). Our review of the record disclosed nothing to suggest that this testimony was offered to show that defendant had a defect of character such that he was more likely to have committed the crime charged. *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993). The comments, while unresponsive to the questions posed, were not offered as evidence of other "crimes, wrongs, or acts" under MRE 404(b). Undersheriff Savoie did not say that he was familiar with defendant because defendant had a prior criminal record. Nor will we speculate, as defendant urges, that because Undersheriff Savoie was a member of law enforcement and was familiar with defendant, the jury might have inferred that he had a prior criminal record. As for defendant's accompanying claim that the testimony should have been excluded under MRE 608, this argument, too, fails. Undersheriff Savoie's comments were not made in reference to

defendant's veracity, so MRE 608 is wholly inapplicable. Since there was no error in the admission of this evidence, defendant's claim of ineffective assistance, which is premised on the failure to object to this testimony, must fail. See *People v Johnson*, 451 Mich 115, 121-122; 545 NW2d 637 (1996).

Next, defendant argues that the trial court abused its discretion in admitting Officer Ewing's testimony concerning defendant's status as a parolee. We agree. Generally, a prosecutor may not introduce evidence of a defendant's prior criminal record during its case in chief. *People v Harris*, 113 Mich App 333, 337; 317 NW2d 615 (1982). An exception exists where evidence of a defendant's prior criminal record is relevant for some purpose under MRE 404(b). See *VanderVliet*, *supra* at 55. Here, testimony that Officer Ewing was defendant's parole officer and testimony concerning the terms of his parole was not relevant for any purpose under MRE 404(b). Yet, the trial court issued a cautionary instruction, and upon review we presume that the jurors heeded the instruction because the contrary has not been clearly established. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Therefore, this error does not warrant reversal.

Next, defendant argues that he was denied a fair trial on the basis of cumulative error. The only error at defendant's trial was the testimony of Officer Ewing concerning his status as a parolee. That error was cured by a cautionary instruction. In determining whether a defendant should be granted a new trial because of cumulative error, only actual errors are aggregated to evaluate their cumulative error. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995), quoting *United States v Rivera*, 900 F2d 1462, 1471 (CA 10, 1990) (en banc) ("Impact alone not traceable to error, cannot form the basis for error"). Since the only error found below was cured, there is no basis for reversal because of cumulative error.

Next, defendant argues that the trial court abused its discretion in denying his request for a jury instruction on the lesser included misdemeanor of assault and battery, MCL 750.81; MSA 28.276. In order to challenge the denial of a requested jury instruction, a defendant must show (1) that the instruction was requested; (2) that there is an appropriate relationship between the charged offense and the requested instruction; (3) that the instruction was supported by a rational view of the evidence; and (4) that the instruction would not have confused the jury. See *People v Steele*, 429 Mich 13, 18-22; 412 NW2d 206 (1987). Failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *People v Malach*, 202 Mich App 266, 276-277; 567 NW2d 834 (1993). While defendant did request the instruction, and there was an appropriate relationship between the instruction and the crime charged, the evidence adduced at trial did not support the request. Here, defendant was charged with assault with a dangerous weapon because it was alleged that he pulled a knife on the victim. Defendant denied that a knife was involved. Both he and the victim testified that the victim was the aggressor. Defendant also testified that at no time did he have the "upper advantage," and was simply trying to bring "some tranquillity" to the situation. While we consider this to be a close call, on the basis of this evidence, we cannot say that the trial court abused its discretion in ruling that the requested instruction was not supported by the evidence.

Finally, defendant argues that the trial court abused its discretion in failing to instruct the jury on self-defense. We disagree. This was not a situation where defendant admitting to committing the crime but claimed that his actions were in self-defense. In this case, defendant denied ever using a knife. In

other words, defendant's theory was that he did not commit the offense, i.e., assault with a deadly weapon. Therefore, because self-defense was inconsistent with defendant's theory and the evidence presented at trial, the trial court did not abuse its discretion in failing to read a self-defense instruction.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

I concur in result only.

/s/ Richard A. Bandstra