

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MORRIS JOHNSON,

Defendant-Appellant.

UNPUBLISHED
November 6, 2001

No. 218999
Calhoun Circuit Court
LC No. 98-002561-FC

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder. MCL 750.84; MSA 28.279.¹ He was sentenced as a fourth habitual offender, MCL 769.12(1)(a); MSA 28.1084(1)(a),² to a term of twenty-five to forty-years' imprisonment. He appeals as of right. We affirm.

¹ MCL 750.84; MSA 28.279 provides:

Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.

² MCL 769.12; MSA 28.1084 provides, in part:

(1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been felonies or attempt to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentenc[ed] . . . as follows:

(a) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court . . . may sentence the person to imprisonment for life or for a lesser term.

I. Facts and Proceedings

Defendant's conviction arose out of an altercation with his girlfriend of five years, which culminated in defendant setting her on fire. At the hospital, she was diagnosed with having third-degree burns on her face, chest and left upper arm and other "severe burns" on her neck and hands. The victim remained in the Bronson Burn Unit for approximately three months, underwent several surgeries, required a breathing machine for an extended period of time, and will permanently have limited ability of her left arm.

At trial, defendant testified that he did not burn the victim, claiming instead that she had burned herself in a suicide attempt. The victim disputed this claim and also testified that defendant had previously chased her with kerosene. This testimony was corroborated by defendant's neighbor who testified that approximately five or six months before this incident, the victim had ran to her apartment having been doused with kerosene, and that defendant was right behind her when this occurred.

On appeal, defendant argues that the trial court impermissibly (1) permitted other acts evidence and photographs of the victim's injuries into evidence, (2) allowed the prosecutor an additional opening statement as part of the voir dire questioning of prospective jurors, (3) failed to instruct the jury on the lesser included misdemeanor offenses of aggravated assault³ and assault and battery,⁴ (4) allowed the fact that defendant exercised his right to remain silent to be exposed to the jury, and (5) denied him access to the victim's health records and his request to compel the victim to undergo a psychological evaluation. In addition, defendant argues that his equal protection rights were violated when African-Americans were excluded from his jury and that he was denied effective assistance of counsel.

A. Other Acts Evidence

Defendant contends that the trial court erred in admitting testimony from the victim and his neighbor that defendant had doused the victim with kerosene on a previous occasion. We disagree. Decisions to admit other acts evidence pursuant to MRE 404(b) is a matter within the trial court's discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, acts is not admissible to prove the character of a person in order to show action 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

³ MCL 750.81a; MSA 28.276(1)

⁴ MCL 750.81; MSA 28.276

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), our Supreme Court held that for evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b) it must be (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit a crime, (2) relevant to an issue or fact of consequence at trial and (3) sufficiently probative to prevail under the balancing test of MRE 403. *Id.* at 64-65; See also *People v Smith*, 243 Mich App 657, 670; 625 NW2d 96 (2000). In addition, if the evidence is admitted, either party may request a limiting instruction. *VanderVliet, supra* at 75; *Smith, supra*. Also, when the evidence is sought for identity purposes, there must be substantial proof that the defendant committed the previous act, that the act has a "special quality or circumstance" tending to prove the defendant's identity and that the identity of the perpetrator must be at issue in the trial. *VanderVliet, supra* at 66-67 n 16; *Smith, supra*. Further, MRE 404(b)(1) is a rule of inclusion that permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct. *Starr, supra* at 496. Thus, the proper inquiry is not whether the testimony would be more prejudicial than probative, but rather "whether the probative value is substantially outweighed by the risk of unfair prejudice." *Starr, supra* at 499.

Here, the evidence was offered to show a plan, scheme or system in doing an act. In addition, because defendant denied setting the fire, the evidence could have also been properly admitted in order to prove identity. Thus, the evidence was admitted for a proper purpose under MRE 404(b), and not to prove the defendant's character or propensity to commit the crime. Additionally, because the victim in the instant case was set afire by using an ignitable fluid, the evidence of defendant chasing the victim and dousing her with kerosene, which is an ignitable fluid, was certainly relevant. Further, since dousing someone with kerosene would be a "special quality or circumstance", *VanderVliet, supra*, the second element was met in this case. Finally, the court provided a cautionary instruction that stated, in part, that the jury was

not [to] consider this evidence, this prior evidence, for any other purposes. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of the other bad conduct.

Particularly in light of this cautionary instruction, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Starr, supra* at 499. See also *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999), citing *Gibson, supra* at 534. Consequently, the court did not abuse its discretion in admitting the prior acts evidence.

B. Photographs of the Victim

Similarly, defendant argues that the trial court abused its discretion by admitting photographs of the victim's burn injuries. Again, we disagree. As with other acts evidence, a trial court's decision to admit photographs rests solely within its discretion. See *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified on other grounds, 450 Mich 1212 (1995); *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997).

In the instant case, the photographs were relevant to the issue of defendant's intent to commit murder and their probative value was not substantially outweighed by the danger of unfair prejudice. *Mills, supra* at 75-76; *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972), quoting 29 Am Jur 2d, Evidence, § 787, pp 860-861; *Flowers, supra* at 736. This is true even though one or two of the photographs disclosed the gruesome aspects of a burn victim, *Eddington, supra*, and despite the fact that witnesses were available to testify as to the information contained in the photographs. See *Mills, supra*.

III. Prosecutor's Voir Dire of Jurors

Defendant also argues that the prosecutor impermissibly argued his proofs during voir dire by asking the prospective jurors if they had ever seen a burn victim, understood that it could be gruesome, indicating that defendant was responsible, and for bringing up issues related to motive.⁵ During trial, defendant failed to object to the challenged statements or request a limiting instruction based on those statements at trial. As such, appellate review of allegedly improper conduct on the part of the prosecutor is precluded and this Court will only review the defendant's claim for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370

⁵ Specifically, defendant contends that the following comments were improper:

The Judge indicated earlier that the nature of the charge, assault with intent to murder, and told each of you that it involved an act of the defendant as we claim of lighting [the victim] on fire. *Have any of you ever seen a person who has been severely burned?*

* * *

Okay. For those that have seen it, and for those that haven't, *do you understand that pictures could be gruesome or the thought of the burns can also be very difficult?*

* * *

I have to prove each of the elements beyond a reasonable doubt to all of you. I do. And one of the elements that I have to prove is whether the defendant intended to kill [the victim.] *When she was lit on fire, when he lit her on fire, did he intend to kill her?* That's what's up in somebody's mind, what they're thinking, why they did that.

* * *

[The defense attorney] had asked the jury panel some questions about motive and *maybe the panels need to know why someone would do something like light another person on fire.* Do you remember that question? [Emphasis added.]

(2000), citing *People v Carines* 460 Mich 750, 761-762; 597 NW2d 130 (1999). See also *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994) and *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Under a plain error analysis, the following requirements must be met in order to obtain relief: (1) error must have occurred, (2) the error must be plain, i.e., clear or obvious, and (3) the plain error must have affected defendant's substantial rights. *Carines*, *supra* at 763. Further, reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" independent of the defendant's innocence. *Id.* at 763-764.

Prosecutorial misconduct issues are decided case by case and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Schutte*, *supra*, citing *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). The comments must also be considered in light of defense arguments. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); See also *Schutte*, *supra*, citing *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982).

In the instant case, the jury was aware that the charge against defendant was assault with intent to commit murder. Thus, in questioning the jurors during voir dire about whether they had ever observed burn victims, or observed photos depicting burn victims, the prosecutor was attempting to develop a rational basis for excluding jurors who would not be able to handle the graphic and sensitive evidence in the case. Accordingly, the questions were not improper. *People v Harrell*, 398 Mich 384, 388; 247 NW2d 829 (1976). Further, when the prosecutor stated "when she was lit on fire, when he lit her on fire," the jury had just been reminded that the prosecutor had to prove each and every element of the crime beyond a reasonable doubt, including whether the defendant had actually "lit her on fire." Consequently, we find that given the context of this statements, the jury could not have been unduly or impermissibly influenced. See *Schuetz*, *supra*. Finally, it is clear that the prosecutor's discussion of motive was made in response to defense counsel's statement during voir dire.⁶ *Lawton*, *supra*. Because defendant has failed to demonstrate a plain error that affected his substantial rights, appellate relief is not warranted. *Carines*, *supra*; *Schutte*, *supra*.

IV. Lesser Included Offenses

Defendant further contends that the trial court erred when it failed to instruct the jury on the lesser included misdemeanor offenses of aggravated assault and assault and battery. We disagree. The trial court is only required to give requested instructions that are supported by the evidence. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). However, a trial court need not give requested instructions that the facts do not warrant. *Piper*, *supra*. The determination of whether a jury instruction is applicable to the facts of a certain case lies with trial court and our review is limited

⁶ Defense counsel had previously informed the jury that the prosecution did not have to prove motive, but then went on to state that "if you have not proven why someone does something, that can go to showing [sic] that they did not prove that someone has an intent to do something."

to whether the trial court's determination was an abuse of discretion. *Ho, supra; People v Perry*, 218 Mich App 523, 526; 554 NW2d 362 (1996).

Here, although defendant requested the additional instructions, the crimes of aggravated assault and assault and battery are not supported by a rational view of the evidence. *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982); *Piper, supra*. The evidence clearly showed the use of a dangerous weapon in the perpetration of the assault and a specific intent to commit great bodily harm less than murder.⁷ In addition, defendant's theory of the case was that the victim set herself on fire and that he in no way assaulted her. Thus, the trial court did not abuse its discretion in denying defendant's requests for instructions on the lesser misdemeanor offenses of aggravated assault and assault and battery. *People v Malach*, 202 Mich App 266, 276-277; 507 NW2d 834 (1993).

V. Defendant's Right to Remain Silent

Although defendant argues that his right to remain silent was infringed by the arresting officer's testimony, because defendant did not object to the testimony at trial, this issue is not preserved. Accordingly, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *Carines, supra*. The record reveals that the officer's testimony involved an "unresponsive answer to a general question" and there is no indication that the prosecutor used the officer's response to "restrict the exercise of the constitutional right to remain silent." *People v Sain*, 407 Mich 412; 415-416; 285 NW2d 772 (1979); See also *People v Hackett*, 460 Mich 202, 215; 596 NW2d 107 (1999). We conclude, therefore, that defendant has failed to demonstrate a plain error that affected his substantial rights. *Carines, supra*.

VI. Discovery and Psychological Evaluation

Defendant also argues that the trial court abused its discretion by denying his motion to compel discovery of the victim's medical and mental health records and to compel the victim to undergo a psychological evaluation. *People v Lemcool (After Remand)*, 445 Mich 491, 497; 518 NW2d 437 (1994); *People v Valeck*, 223 Mich App 48, 51; 566 NW2d 26 (1997). The record reveals that the trial court denied defendant's motions, without prejudice, because defendant failed to cite any authority in support of his requests. The court informed defendant that he could renew his motions if properly supported. Because defendant never subsequently refiled the motions, we conclude that this issue has been waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 149 (2000). In any event, assuming the issue was not waived, defendant failed to present any compelling reason why the requests should be granted. See *People v Payne*, 90 Mich App 713-723; 282 NW2d 456 (1979).

VII. Equal Protection Claim

We also conclude that defendant's claim that he was denied a fair trial because of systematic exclusion of African-Americans from the jury venire is without merit. Defendant

⁷ Both aggravated assault and assault and battery are crimes committed without a weapon. See MCL 750.81; MSA 28.276; MCL 750.81a; MSA 28.276(1).

never objected to the jury array at trial and has not shown that any under-representation of African-Americans was due to systematic exclusion. *People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000); *People v Hubbard (After Remand)*, 217 Mich App 459, 472-473; 552 NW2d 493 (1996). See also *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000) and *People v Howard*, 226 Mich App 528, 532-534; 575 NW2d 16 (1997).

VIII. Ineffective Assistance of Counsel

Finally, defendant contends that his counsel's failure to call a witness resulted in him being deprived of effective assistance of counsel. Again, defendant failed to preserve this issue by failing to request a *Ginther*⁸ hearing or new trial below.⁹ Thus, our review is limited to deficiencies sufficiently detailed in the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 845 (1995). Here, the record indicates that the desired testimony would have been cumulative to the victim's testimony, wherein the victim already admitted that she had asked the potential witness how to obtain disability benefits. Therefore, it is not apparent from the record that counsel's failure to call the witness deprived defendant of a substantial defense. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1999). Further, our resolution of the issues previously addressed in this opinion do not support a claim of ineffective assistance of counsel. Therefore, we conclude that defendant was not denied the effective assistance of counsel. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000); *Ho, supra* at 191.

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder

⁸ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

⁹ While we note that defendant did move for a new trial below, that motion did not contain defendant's ineffective assistance claim. We also note that defendant filed a motion for reconsideration of the trial court's denial of a new trial where he did raise his ineffective assistance claim. However, the trial court denied the motion for reconsideration because it "raise[d] new grounds not previously pled and thus should be brought as a second motion for a new trial with notice to the prosecution and an opportunity for the People to respond." Despite this order of the court, the record fails to indicate that defendant did, in fact, file a second motion for a new trial. Thus, because defendant never raised his ineffective assistance claim by way motion for a new trial, defendant did not preserve the issue. *Ginther, supra*. Further, because defendant never filed a second motion for a new trial, even though the trial court indicated to him that he should do so in order to address his ineffective assistance claim, this issue appears to have been waived. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 149 (2000).