

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WANELL ROGERS,

Defendant-Appellant.

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UNPUBLISHED

July 27, 2004

No. 245800

Lake Circuit Court

LC No. 02-003893-FH

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felonious assault, stemming from the use of his truck to collide with the car in which his former girlfriend and her male companion were driving, in violation of MCL 750.82. We affirm.

Defendant first argues that the trial court abused its discretion by improperly admitting other acts evidence under MRE 404(b). We review a trial court's decision to admit MRE 404(b) evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). MRE 404(b)(1) provides in pertinent part:

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

Therefore, evidence is admissible under MRE 404(b) if it: (1) is offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) is relevant to an issue or fact of consequence at trial, and (3) is sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *Starr, supra* at 496-497. The admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge,

the theories of admissibility, and the defenses asserted. *People v Vandervliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

The female victim had been in a relationship with defendant for seventeen years, and they had a four-year old son together. At trial, the prosecutor elicited testimony from the female victim that while she and her male companion were at her house on the morning of the incident, defendant telephoned her and demanded to know “who’s at my house?” and told her to “get him out.” When the couple left in the male victim’s car, defendant chased them on a bicycle. A few minutes later, defendant began driving towards them in his truck, and the male victim had to swerve off the road to avoid colliding with defendant. Defendant made a u-turn, and continued to follow them. The female victim told the male victim to drive to the police station, which was a few miles away. At a stop sign, defendant almost rear-ended the car, but the male victim accelerated to avoid being struck. However, defendant caught up to the car and rear-ended it, pushing it into the parking lot of the police station. Several police officers came outside after hearing squealing tires and a collision, and observed defendant get out of his truck, reach into the car, and shout obscenities at the male victim. Defendant maintained that the collision was an accident.

The prosecutor elicited testimony from the female victim that she had a personal protection order against defendant, and that ten days before the incident, defendant came to her house, kicked in the door, and physically and sexually assaulted her. She testified that she had called the police on defendant on a few other occasions, and that defendant would “get mad,” “once [] tore up [her] house,” and is “abusive.” Defense counsel objected on the grounds that her testimony constituted inadmissible evidence under MRE 404(b)(1) and (2), because it was not being offered for a proper purpose, and he had not been given proper notice. The prosecution argued that such evidence was admissible to show a common scheme or plan of assaultive conduct towards the female victim. The trial court gave the jury a cautionary instruction that “they should not consider just because someone did something on another particular day that their character is that they would do it on this particular day as well,” and that they “need[ed] to look at the facts of what happened on this day.” The trial court determined that the evidence was properly admissible under MRE 404(b) to refute defendant’s contention that the collision was an accident.

At the close of the proofs, defense counsel moved for a directed verdict, partially on the basis of the MRE 404(b) testimony. The trial court again reiterated that “[i]f there’s argument that there was an accident [that] occurred, that actually is permissible under 404(b).” The trial court also indicated that it believed the evidence was “part of the res gestae of these parties,” and that it did not “think [there was] a 404(b) problem in any event.” During jury instructions, the trial court instructed the jury:

You have heard evidence that was introduced to show that the defendant committed other improper acts for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about this evidence and whether it tends to show that the defendant acted purposefully, that is, not by accident or mistake or because he misjudged the situation. Or to under – you may use it to understand the underlying relationship of the parties as it relates to the facts of this case.

Defendant argues that the trial court abused its discretion by admitting the female victim's testimony regarding his prior assaultive conduct toward her.<sup>1</sup> We disagree. On appeal, the prosecution argues that the female victim's testimony was properly admissible under the "absence of mistake or accident" and "intent" exceptions to the general rule precluding admission of other acts evidence.<sup>2</sup> We agree that the evidence was properly admissible to refute defendant's claim that the collision was an accident and to prove that he intended to injure or place the victims in reasonable apprehension of an immediate battery, an element of felonious assault, because showing intent is one of the proper purposes expressly listed in MRE 404(b)(1).

The evidence was also material, as required for admission under MRE 404(b)(1). "Evidence probative of a matter 'in issue' is material." *People v Miller*, 165 Mich App 32, 43; 418 NW2d 668 (1987). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).<sup>3</sup> That defendant had the requisite intent to injure or place the victims in reasonable apprehension of an immediate battery was "in issue," because defendant maintained that the collision was an accident. Moreover, felonious assault is a specific intent crime, and intent "may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992), quoting *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974).

The evidence is also relevant, because the fact that defendant assaulted the female victim ten days before the incident makes the existence of an intent to injure or place the victims in reasonable apprehension of an immediate battery more probable than it would be absent such actions. Additionally, the evidence is sufficiently probative to outweigh the danger of unfair

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<sup>1</sup> Although the prosecutor did not strictly comply with MRE 404(b)(2) by giving pretrial notice of his intent to elicit evidence of defendant's prior assaultive conduct, this deficiency did not affect defendant's substantial rights because the evidence was admissible and defendant does not suggest how he would have reacted differently to the evidence had notice been given. *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001). Stated another way, the failure to provide proper notice was plain error, but not error of the sort that requires us to reverse defendant's conviction. We are not convinced that defendant "is actually innocent or [that] the error seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings," and conclude that the prosecutor's error in failing to provide proper notice was harmless. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>2</sup> While the prosecutor argued below that the evidence was admissible under the "common plan or scheme" exception, our Supreme Court has indicated that prosecutors may offer a proper purpose for the evidence at any time, whether at trial or on appeal. See *People v Sabin (After Remand)*, 463 Mich 43, 59 n 6; 614 NW2d 888 (2000) ("The prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence.")

<sup>3</sup> A vehicle may constitute a dangerous weapon within the meaning of the felonious assault statute if it is used in furtherance of accomplishing the assault. *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984).

prejudice, and defendant, beyond his contention that the evidence was used only to show his bad character and action in conformity therewith, does not indicate how its probative value was substantially outweighed by the danger of unfair prejudice under MRE 403.

Because the evidence concerning defendant's assaultive conduct toward the female victim ten days before the incident was offered for a proper purpose and its probative value was not substantially outweighed by the danger of unfair prejudice, the trial court did not abuse its discretion in admitting the female victim's testimony.

Defendant next argues that the prosecutor engaged in prosecutorial misconduct by improperly vouching for the credibility of the victims, appealing to the jurors' sympathy, and denigrating defense counsel. We disagree. At trial, defendant failed to object to any of the claimed errors. Because "appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object," we review defendant's claim for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US \_\_\_; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant argues that the following comments constituted improper vouching by the prosecutor:

What you saw yesterday is [the female victim] in abject terror, sitting there in front of the defendant, trying to tell her story. Was she lying to you? No, she wasn't lying to you. She was trying to recall what she could best recall after being subjected to this terror for the period time.

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[The male victim], . . . [h]e unfortunately suffered one of the worst of human frailties: he was unfaithful to his wife. And he admitted that to you. But he told you his story, and he told you his story honestly.

While a prosecutor may not vouch for the credibility of a witness by implying that he has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), a prosecutor may argue on the basis of evidence presented that a witness is credible. *Schutte*, *supra* at 722. Viewing the prosecutor's remarks in context, the prosecutor was not arguing that he had some special knowledge that the victims' testimony was truthful; rather, he was arguing that despite the female victim's difficulty remembering the details of the incident due to her fear of defendant, and despite the male victim's infidelity to his wife, they were credible witnesses nonetheless.

Defendant next argues that the prosecutor improperly appealed to the jurors' sympathy when he referred to the male victim as "that poor man." While a prosecutor may not make appeals to the jury for sympathy with the victim, *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988), the remark made by the prosecutor was "not [a] blatant appeal[] to the jury's sympathy and w[as] not so inflammatory that defendant was prejudiced." *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Moreover, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely

instruction.” *Schutte, supra* at 721. Additionally, the trial court instructed the jury that they must not let sympathy influence their decision.

Finally, defendant argues that the prosecutor improperly denigrated defense counsel when he made the following comments on rebuttal:

[Defense counsel’s] characterization – I’m sorry, [defense counsel’s] character assassination is totally improper. And I’m not even going [to] comment on it. It’s not worth your even listening.

It is well settled that “the prosecutor’s comments must be considered in light of defense counsel’s comments.” *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). In closing argument, defense counsel implied that the victims fabricated their testimony about the incident because they left the scene shortly after the accident, and that doing so was inconsistent with the actions of someone who had just been assaulted. Defense counsel also argued that defendant was unfairly charged with felonious assault while the victims were not charged with leaving the scene of an accident and adultery. “Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel.” *Schutte, supra* at 721. Here, the prosecutor’s comment about defense counsel’s “character assassination” of the victims was responsive to defense counsel’s comments that the victims’ testimony was untruthful and that the victims should have been charged with crimes, and was not improper.

We affirm.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Joel P. Hoekstra