

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 25, 2014

v

TIMOTHY LAMONTE BLANTON,

Defendant-Appellant.

No. 313384
Kent Circuit Court
LC No. 12-004146-FH

Before: GLEICHER, P.J., and HOEKSTRA and O’CONNELL, JJ.

PER CURIAM.

A jury convicted defendant Timothy Lamonte Blanton of aggravated domestic assault, MCL 750.81a(3), for physically attacking his live-in girlfriend. Defendant challenges the prosecutor’s use of his prior acts of domestic violence against him. That information was presented solely to impeach the victim who had recanted her accusations and called defendant a “peaceable” and nonabusive person. We discern no error in the use of the evidence for this purpose. Defendant also challenges the trial court’s interruption of his testimony to tell the jury to disregard his reference to excluded evidence, followed by the court’s refusal to allow defendant to withdraw his decision to testify before the prosecutor could cross-examine him. Contrary to defendant’s arguments, these actions did not interfere with defendant’s right to testify or to avoid self-incrimination. We affirm.

I. BACKGROUND

Defendant and the victim were romantically involved and lived together. On the evening of April 21, 2012, they had an altercation. That night, the victim indicated that defendant hit her repeatedly in the face, head, and chest with his fists. The victim told the responding officers that she had received a text message and defendant believed the message came from another man with whom she had previously had an affair. To escape the assault, the victim jumped out of the second-floor window and ran to a neighbor for help. An officer soon found defendant outside. While being placed under arrest, defendant admitted that he “lost it” and assaulted the victim. The victim was taken to the emergency room because she suffered multiple lacerations, some of which required stitches, as well as a broken nose and internal injuries. She thereafter sought and obtained a personal protection order against defendant. The prosecutor presented the testimony of several police officers to outline these events.

By the time of trial, however, the victim and defendant had changed their stories. The victim claimed not to recall the details of the evening in question. She repeatedly asserted that defendant was not as culpable as she originally claimed. The victim then testified that defendant had actually attempted to leave the apartment and she instigated the attack by “snatch[ing]” and “tussling over” his phone. The victim described that she blocked defendant’s exit with her body and threw objects from around the apartment at him. Defendant pushed her down and restrained her, but defensively. While the victim admitted that defendant may have elbowed or punched her once, she claimed her injuries stemmed largely from her fall to the floor. During this fall, according to the victim, she hit her head. Because of this head injury and her level of intoxication, the victim averred that she was startled and then irrationally jumped out of the window. Defendant corroborated this version of events. Despite this change of tune, the jury convicted defendant as charged.

II. PRIOR BAD ACTS EVIDENCE

Defendant contends that the prosecutor improperly elicited testimony from the victim regarding his prior acts of domestic violence and that defense counsel was ineffective in failing to object. The prosecutor’s question, however, was designed to impeach the victim about character testimony she gave on examination by defense counsel. The question was proper and defense counsel had no ground for objection.

During cross-examination of the victim, defense counsel asked if defendant “was a peaceable person.” The victim responded affirmatively and asserted that, other than the charged incident, defendant had never attempted to harm her. The victim testified, “He’s not abusive. . . . He’s not an abusive person.” On redirect examination, the prosecutor asked the victim if she was “aware that [defendant] was arrested seven times for assaulting” the mother of his children. The victim replied that she had no such knowledge.

“Generally, Michigan’s Rules of Evidence proscribe the use of character evidence to prove action in conformity therewith. Character evidence includes evidence of other crimes, acts, or wrongs[.]” *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). See also MRE 404(b). Here, the prosecutor did not question the victim about defendant’s prior domestic violence arrests to prove that he committed domestic violence in this case. Rather, defense counsel opened the door by eliciting testimony from the victim that defendant was “a peaceable person.” MRE 404(a)(1) permitted defense counsel to question the victim about defendant’s “pertinent trait of character,” i.e. peacefulness. But the prosecutor then became entitled to rebut the evidence.

In *People v Whitfield*, 425 Mich 116, 128; 388 NW2d 206 (1986), the defendant, who was charged with sexually assaulting a young child, presented the testimony of a religious minister to describe his character as a “good person.” In rebuttal, the prosecutor asked the witness if his opinion of the defendant would change if he learned that the defendant had committed a sexual assault against a young boy seven years earlier. *Id.* at 129. The Court described MRE 404(a)(1) as a “mercy rule,” allowing criminal defendants to present evidence of their good characters despite the general evidentiary bar. *Id.* at 130. The Court then identified the danger of a defendant presenting such evidence: that the presentation opens the door for the prosecutor to rebut the same. *Id.* While the defendant is limited to proving his character with

reputation evidence, MRE 405(a) permits the prosecutor to examine the character witness with examples of specific conduct. *Id.* at 130-131. This is exactly what happened in this case. Upon defense counsel’s questioning, the victim extolled defendant’s virtue as a peaceable, nonabusive person and “unwittingly furnish[ed] the foundation for the prosecutor to acquaint the jury with matters which otherwise could not be admitted into evidence.”¹ *Id.* at 131.

As noted in *Whitfield*, 425 Mich at 131-132, “[t]he valid purpose of such impeachment is to test the credibility of the character witness by challenging the witness’[s] good faith, information, and accuracy.” As a general rule, the prosecutor must state his or her intent to use such evidence for impeachment purposes before trial and allow the court to determine “whether the probative value of the line of questioning is substantially outweighed by the prejudicial effect.” *Id.* at 133. See also MCL 768.27b(2) (the prosecutor must state intent to present evidence of other acts of domestic violence not less than 15 days before trial); *People v Watkins*, 491 Mich 450, 455; 818 NW2d 296 (2012) (evidence of prior acts of child sexual abuse admissible under MCL 768.27a is still subject to MRE 403’s exclusion of evidence that is unfairly prejudicial). No such advance notice was given in this case. However, we discern no ground for finding that the prejudicial effect of the evidence unfairly outweighs the probative value.

As the evidence was presented for a proper purpose—to impeach the victim’s testimony about defendant’s character—the prosecutor did not engage in misconduct in questioning the witness. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (holding, “prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence”). And counsel is never ineffective for failing to raise baseless objections. *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012). Accordingly, defendant is not entitled to relief.

III. DEFENDANT’S RIGHT TO TESTIFY AND NOT TO INCRIMINATE HIMSELF

Defendant contends that the trial court interfered with his right to testify in his own defense by interrupting his testimony to instruct the jury that photographs mentioned by defendant were not admitted into evidence. He also contends that the court violated his right to avoid self-incrimination by forcing defendant to testify after he withdrew his right to testify in his own behalf.

During defendant’s testimony, he admitted that he hit the victim two times defensively. He asserted that the victim’s “other injuries” were caused when she fell into a fish tank, heater, and speaker in the apartment. Defendant indicated that the crime scene investigators did not take pictures of those items. He then stated, “I’ve got pictures in the phone, but the judge would not let me show the jury the pictures.” Defendant was referring to photographs of the apartment he had taken using his cell phone camera. Prior to trial, the court had ruled those photographs to be inadmissible because defendant failed to reveal them during discovery. Defendant does not

¹ This case is slightly different than *Whitfield* because evidence of defendant’s past acts of domestic violence was actually “admissible for any purpose for which it is relevant.” MCL 768.27b(1).

challenge that ruling on appeal. The court interrupted defendant's testimony and told the jury, "[T]he Court made a ruling on evidence. It is completely inappropriate for this witness to be talking about rulings that I made outside the presence of the jury. You are to disregard that last testimony. You are instructed not to talk about that." Defense counsel continued his direct examination and eventually asked defendant about how the victim jumped from the window. Defendant responded, "Well, I wish I had the pictures, 'cause I was—[.]" The court did not allow defendant to finish his answer. Instead the court excused the jury for the day, admonished defendant for referring to the pictures as forbidden, held defendant in contempt of court, and revoked defendant's bond. The court stated that defendant could finish his testimony the following day, but if he referred to the pictures again, "his testimony will be completed."

When trial resumed the next day, the court conveyed its willingness to allow defendant to continue testifying so long as he obeyed the court's orders. Defense counsel notified the court that defendant did "not want to testify further." Counsel clarified that defendant was under the mistaken impression that the court instructed the jury to disregard all his testimony, not just the comments about the cell phone pictures. The court reassured defendant that he instructed the jury to disregard only the improper testimony. And the prosecutor indicated that she would not waive her right to cross-examine defendant. At the close of the discussion, defense counsel asked defendant, "Do you want to get on the stand?" The court interjected, "Well, he has to get to the stand." Defendant retook the stand and his attorney continued direct examination.

A defendant has a constitutional right to testify in his own defense. *People v Boyd*, 470 Mich 363, 373; 682 NW2d 459 (2004), citing *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987). The right is not absolute, and "the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *People v Kowalski*, 492 Mich 106, 139; 821 NW2d 14 (2012) (quotation marks and citation omitted). Defendant did not have a right to refer to or rely upon evidence that had been ruled inadmissible and the trial court was within its right to prevent the defendant's improper testimony. The record clearly shows that the court instructed the jury only to disregard the specific statements pertaining to the inadmissible evidence and not defendant's testimony in general. Accordingly, defendant's claim that he was denied his constitutional right to testify is without merit.

Just as a defendant has the right to testify in his own defense, he is also afforded the protection against compelled self-incrimination and thus may choose not to testify. *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). However, once a defendant makes the decision to testify, he waives his privilege against self-incrimination and he is not thereafter entitled to reassert it to avoid cross-examination. See *People v Clary*, 494 Mich 260, 278-279; 833 NW2d 308 (2013), quoting *Brown v United States*, 356 US 148, 154; 78 S Ct 622; 2 L Ed 2d 589 (1958) ("A defendant in a criminal case does not have to testify. However, '[i]f he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness'"); *Fields*, 450 Mich at 109, quoting *Brown*, 356 US at 155-156 ("If, 'after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts . . . ' a defendant decides to testify, '[h]e cannot reasonably claim that the Fifth Amendment gives him not only his choice but . . . an immunity from cross-examination on the matters he has himself put in dispute.'"). Defendant affirmatively chose to take the witness stand in his own defense. Once on the stand, defendant

was displeased with being controlled by the court's evidentiary rulings. Despite his displeasure, defendant could not change his mind midstream and deny the prosecutor the right to cross-examine him. Defendant's challenge in this regard is therefore completely without merit.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell