

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ARTHUR MUNIZ,

Defendant-Appellant.

UNPUBLISHED

September 21, 2006

No. 259291

Wayne Circuit Court

LC No. 04-001887-01

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 29-1/2 to 60 years for the assault conviction, 40 to 60 months for the felon-in-possession conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

Defendant's convictions arise from the January 30, 2004, nonfatal shooting of his former girlfriend's boyfriend, who was shot in the arm and the head, resulting in the loss of his left eye. Defendant fled the state after the shooting. He was arrested at a motel after returning to Michigan with his father. At trial, defendant admitted that he was present and possessed a gun when the victim was shot, but claimed that some other, unidentified person shot the victim.

II. REQUEST FOR ADJOURNMENT

On appeal, defendant first challenges the trial court's decision denying newly retained counsel's request for an adjournment in order to prepare for trial. We disagree.

A. Standard of Review

We review the trial court's decision for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

B. Analysis

A request for an adjournment must be based on good cause. MCR 2.503(B)(1); *Jackson, supra* at 276. Factors relevant to this determination are whether the defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) was negligent, and (4) requested previous adjournments. *Coy, supra* at 18. If a defendant seeks an adjournment based on the unavailability of a witness or evidence, the defendant must also show the materiality of the evidence and that diligent efforts were made to produce it. MCR 2.503(C)(2); *Jackson, supra* at 278; *Coy, supra* at 18.

Here, because defense counsel's request for an adjournment did not involve a claim that any particular witness or evidence was unavailable, we consider only whether defendant demonstrated good cause for an adjournment. Although defense counsel's request implicated defendant's right to have counsel prepare, investigate, and present all substantial defenses, *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990), the record also discloses that defendant was negligent in waiting until shortly before trial to retain counsel to replace appointed counsel. Defendant's negligence, coupled with defense counsel's failure to establish a specific need for an adjournment, beyond general preparation and unspecified follow-up work by a defense investigator, supports the trial court's decision to deny an adjournment. We agree that docket concerns would not alone support the denial of an otherwise proper request for an adjournment. *People v Williams*, 386 Mich 565, 577; 194 NW2d 337 (1972). Considering the record as a whole, however, the trial court did not abuse its discretion in denying the request.

III. RIGHT TO CALL AND LOCATE WITNESSES

Defendant next argues that he was denied his right to call defense witnesses as a result of the trial court's refusal to grant sufficient time to locate an expert witness.

A. Standard of Review

Defense counsel did not move for an adjournment to locate an expert witness. Rather, counsel only expressed a need to have someone review the victim's medical records in response to the trial court's inquiry at trial regarding whether there were additional defense witnesses ready to testify. Therefore, we agree with the prosecution that defendant did not preserve this issue for appeal. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

B. Analysis

The trial court found that the matter that defense counsel sought to investigate, i.e., the path of the gunshot wound to the victim's head, was not material. We agree that defendant has not established the relevancy of the proposed investigation to his defense. For purposes of assessing the relevancy of evidence under MRE 401, a material fact is one at issue in a case in the sense that it falls within the range of litigated matters in controversy. See *People v Sabin*

(*After Remand*), 463 Mich 43, 57; 614 NW2d 888 (2000). Relevant evidence is “evidence that is material (related to any fact of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence).” *Id.*

Here, whether the victim was shot in the front or back of the head was not totally outside the range of litigated matters, inasmuch as the victim testified that defendant was pointing the gun at his face when he was shot in the eye. Dr. David Morro’s opinion that the gunshot wound entered the left eye, and Aaron Martinson’s testimony that he saw defendant shoot the victim in the face, corroborated the victim’s testimony. But whether the victim was shot in the front or back of the head would not have aided defendant’s theory that an unidentified man on a porch may have shot the victim, inasmuch as defendant testified that he did not see the direction from which the victim was shot.

Further, looking to the good cause standard in *Coy, supra* at 18, it is not apparent that good cause existed for an adjournment. Because defense counsel did not propose any particular expert witness, we reject defendant’s claim that his Sixth Amendment right to present a defense witness through compulsory process, *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967), was implicated by the lack of an adjournment. The right to compulsory process requires a showing that a witness’s testimony would be material and favorable to the defense. See *People v McFall*, 224 Mich App 403, 408; 569 NW2d 828 (1997). Although a defendant nonetheless has a right to have defense counsel investigate substantial defenses, *Kelly, supra* at 526, it is not apparent from the record what investigation, if any, defendant’s prior two attorneys conducted. Additionally, it is apparent from defense counsel’s opening statement at trial that he was aware that the victim’s medical records contained conflicting information regarding the path of the gunshot wound. Counsel was able to show that Dr. Morro initially thought that the gunshot wound entered the back of the head. We are unable to conclude from the record that good cause existed for an adjournment.

Even assuming that good cause existed, however, there is nothing in the record to indicate that defendant could have found an expert willing to testify that the victim was shot in the back of the head by anyone, let alone someone standing on the porch of a nearby house. Thus, defendant has failed to show that he was prejudiced by the lack of an adjournment. *Coy, supra* at 18-19. Accordingly, the trial court’s failure to adjourn trial in response to defense counsel’s expressed preference to have someone look at the victim’s medical records was not plain error.

IV. ADMISSIBILITY OF 911 CALL

Defendant next argues that the trial court erred by allowing the prosecutor to introduce an audiotape of a 911 telephone call made by defendant’s mother to the Sterling Heights Police Department. We disagree.

A. Standard of Review

The decision whether to admit evidence is within the trial court’s discretion; this Court only reverses such decisions where there is an abuse of discretion. However, decisions regarding the admission of evidence frequently involve

preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. Accordingly, when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. [*People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999) (citations omitted).]

B. Analysis

Only the portion of the audiotape in which defendant's mother related what she was told by defendant was played for the jury. There was a sufficient foundation to admit this evidence under the excited utterance exception to the hearsay rule. MRE 803(2); *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). Defendant's mother gave a plausible explanation at trial for delaying the 911 phone call in order to first contact her daughter. Further, her concerns that defendant may have killed someone and might commit suicide support a determination that the statements in the 911 call were made while under the stress of excitement caused by a startling event. *Id.* Additionally, defendant's own statements to his mother as reported in the 911 call were admissible as party admissions. See MRE 801(d)(2)(A) (statement is not hearsay if it is offered against a party and is the party's own statement) and MRE 805 (each part of combined statements must conform to an exception to the hearsay rules). Therefore, the trial court did not abuse its discretion in allowing the prosecutor to play the portion of the 911 phone call at trial. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

V. SUFFICIENCY OF EVIDENCE

Defendant next argues that the prosecutor failed to present sufficient evidence to sustain his conviction for felon in possession of a firearm. We disagree.

A. Standard of Review

When reviewing the sufficiency of the evidence, an appellate court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002).

B. Analysis

Although it was essential that the prosecutor establish that defendant was a convicted felon, *People v Tice*, 220 Mich App 47, 55; 558 NW2d 245 (1996), defendant had the initial burden of producing evidence of an exception, excuse, proviso, or exception under MCL 750.224f. See *People v Perkins*, 473 Mich 626, 638-639; 703 NW2d 448 (2005). The fact that the stipulation referred to by the prosecutor at trial was not formally placed on the record did not preclude the jury from finding defendant guilty of felon in possession of a firearm beyond a reasonable doubt, given defendant's admissions in his testimony that he was not lawfully permitted to possess a gun because he was a convicted felon. Defendant's admissions, coupled with the overwhelming evidence that defendant possessed a gun, viewed in a light most favorable to the prosecutor, was sufficient to sustain the conviction. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002).

VI. JUDICIAL IMPARTIALITY

Next, defendant argues that the trial court deprived him of a fair trial by repeatedly interrupting and disparaging defense counsel.

A. Standard of Review

We review defendant's unpreserved challenge to the trial court's conduct under the plain error standard in *Carines, supra*. See *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006), lv pending.

B. Analysis

Viewing the trial court's conduct in context, it is not clear or obvious that the court pierced the veil of judicial impartiality at trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). To the extent that defendant challenges remarks made by the trial court outside the jury's presence, those remarks could not have deprived defendant of a fair and impartial trial. *Conley, supra* at 310. The trial court's other challenged remarks were made in the context of making evidentiary rulings sua sponte or in response to the prosecutor's objections. A trial court has a duty to limit evidence to relevant and material matters. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996); see also MRE 611(a). Although a trial court should, to the extent practical, make evidentiary rulings outside the presence of the jury, MRE 103(c), we find nothing in the record to indicate that the trial court's rulings in the presence of the jury in this case were so intemperate as to hold defense counsel in contempt in the eyes of the jury. *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987). Partiality is not established by a trial court's expression of impatience, dissatisfaction, annoyance, or even anger, which are within the bounds of what imperfect men and women sometimes display. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Therefore, this unpreserved issue does not warrant reversal.

VII. INEFFECTIVE COUNSEL

Next, we reject defendant's claim that he is entitled to a new trial because defense counsel fell asleep at trial.

A. Standard of Review

This issue was not presented to the trial court and therefore defendant's claim of constitutional error is reviewed under the plain error doctrine in *Carines, supra*, 460 Mich at 763-765.

B. Analysis

The existing record does not factually support this unpreserved claim. Moreover, it is generally impermissible to expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). An affidavit submitted for the first time with an appellate brief may not serve to enlarge the record. *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981). Although this Court is empowered to grant relief as the case may require, MCR

7.216(A)(7), this Court previously denied defendant's motion to remand for failure to persuade the Court of the necessity of a remand. Furthermore, upon considering the affidavit offered by defendant for the purpose of determining whether the case should now be remanded, we similarly conclude that a remand is not required because defendant has not established that an evidentiary hearing to substantiate his position is warranted. Cf. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

A claim of ineffective assistance of counsel generally requires a showing of both deficient performance and prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The result of the proceeding must be fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Here, defendant does not allege prejudice. Although there are circumstances in which prejudice will be presumed, *United States v Cronin*, 466 US 648, 659 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984), claims that a defense attorney was inattentive or unconscious during a trial do not generally arise to this level unless the circumstances show that counsel's repeated bouts of unconsciousness were significant enough that the fairness of the trial could not be trusted. See *Burdine v Johnson*, 262 F3d 336 (CA 5, 2001); *Tippins v Walker*, 77 F3d 682 (CA 2, 1996).

Here, defendant's affidavit indicates only that a juror, upon glancing at the defense table during the prosecutor's cross-examination of defendant, thought it apparent that defense counsel was sleeping through a portion of defendant's testimony. But the record itself indicates that the prosecutor's cross-examination of defendant is contained in only 26 transcripts pages. Defense counsel objected near the end of the cross-examination, and there is no indication that anyone awakened defense counsel to do so. Furthermore, defense counsel's closing argument referred to matters that were elicited only during the prosecutor's cross-examination of defendant. Although the prosecutor's cross-examination of defendant was not an insubstantial part of the trial, neither the affidavit offered by defendant, nor defendant's claims regarding defense counsel's drug activities, examined in the context of the trial record, call into question the fundamental fairness of the trial or its reliability such as to merit a presumption of prejudice. For these reasons, we are not persuaded that the case should be remanded for an evidentiary hearing regarding defendant's claim.

VIII. ADMISSIBILITY OF EVIDENCE

We also reject defendant's claim that the admission of evidence concerning his stalking activity during the week preceding the shooting, after defendant's former girlfriend terminated her relationship with defendant, was improper.

A. Standard of Review

An appellate court reviews a trial court's evidentiary rulings for an abuse of discretion. *Lukity, supra*, 460 Mich at 488

B. Analysis

Defendant's reliance on MRE 404(b) is misplaced because this evidentiary rule is implicated only if the evidence involves an intermediate character-to-conduct inference. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Evidence can be relevant and admissible independent of MRE 404(b). See *Lukity, supra* at 499; *People v Hall*, 433 Mich 573, 580-583; 447 NW2d 580 (1989) (Boyle, J.). Evidence of related events is admissible when so blended or connected to the crime that proof of one incidentally involves the other or explains the circumstances of the crime. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

Here, the evidence of defendant's preoffense stalking conduct was admissible without reference to MRE 404(b). *Lukity, supra* at 488. The record supports the trial court's determination that the shooting was a culmination of events that began with defendant's breakup with his girlfriend. The evidence indicated that defendant watched and followed both the victim and his former girlfriend during the week preceding the shooting, and made a specific threat directed at the victim to a supervisor at the place where both the victim and defendant's former girlfriend were employed. Without evidence of these events, the jury would have lacked an intelligent presentation of the full context in which the charged shooting took place. The evidence was relevant to the assault charge under MRE 401, without reference to MRE 404(b). *Sholl, supra*; see also *Sabin, supra* at 57.

The question whether the evidence could have been excluded under MRE 403, on the ground that the probative value was substantially outweighed by the danger of unfair prejudice, was not properly preserved at trial. The record reflects that defense counsel objected only to the relevancy of the evidence. An objection to evidence on one ground does not preserve an appellate attack on a different ground. *People v Dewald*, 267 Mich App 365, 377; 705 NW2d 167 (2005). Further, defendant has not established plain error under *Carines, supra* at 763.

All evidence offered by the parties is prejudicial to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Here, it is not apparent that the probative value of the preoffense conduct was substantially outweighed by the danger of unfair prejudice. Permitting the jury to hear that defendant's relationship with his former girlfriend ended, without disclosing the events between the end of their relationship and the shooting, would have left the jury with an evidentiary void. Finally, because the trial court properly admitted the evidence without reference to MRE 404(b), the trial court's refusal to give defendant's proposed "other acts" instruction was not error. *Sholl, supra* at 740-741; see also MRE 105.

IX. PROSECUTORIAL CONDUCT

We find no merit to defendant's claim that the prosecutor's remarks during closing argument deprived him of a fair trial.

A. Standard of Review

In general, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo by an appellate court. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Where a defendant does not timely and specifically object, however, we review the issue for plain error. *Carines, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

B. Analysis

Although defense counsel objected to the prosecutor's closing argument that defendant brought his mother nothing but grief, defendant did not raise the issue now raised on appeal concerning whether the prosecutor made improper arguments regarding the character of defendant and Dr. Morro. Examined in context, the record does not support defendant's argument that the prosecutor was attempting to either bolster Dr. Morro's testimony or suggest that the jury infer from defendant's character that he was guilty of the assault charge. Rather, the prosecutor was addressing the credibility of defendant's mother, a prosecution witness whose character and credibility were attacked by defendant in his testimony. The prosecutor did not ask the jury to infer from defendant's character that he committed the shooting, but to consider the demeanor of defendant's mother when testifying at trial and her relationship with defendant when assessing the credibility of her testimony that defendant confessed to being the shooter. The prosecutor was not required to state his argument in the blandest of terms. *Schutte, supra* at 722. Hence, it is not apparent that the prosecutor's conduct was improper. Even if there was error and it was plain, however, the trial court's instructions to the jury that the attorney's arguments are not evidence and that it must decide the case based on the evidence, and its instructions discussing the factors affecting credibility, including the relationship of the parties, demeanor, and motive for testifying, were sufficient to dispel any possible prejudice. *People v Green*, 228 Mich App 684; 693; 580 NW2d 444 (1998).

Further, defendant has not established that the prosecutor engaged in misconduct by accusing defendant's father of engaging in criminal activity. Although it is impermissible to argue that a defense witness was a party to a crime when the argument lacks supporting evidence, *People v George*, 130 Mich App 174, 180; 342 NW2d 908 (1983), a prosecutor may argue reasonable inferences from the evidence, *Schutte, supra* at 721. The fact that defendant's father did not admit to engaging in criminal activity and offered explanations for his conduct is not dispositive of whether the prosecutor's argument was proper. It was reasonable for the prosecutor to argue from defendant's father's admitted conduct of telling defendant to dispose of his gun, taking defendant to a motel room, and taking defendant's clothes to wash that defendant's father was assisting defendant in destroying evidence and hiding defendant from the police. Therefore, the prosecutor's argument was not improper. *Schutte, supra* at 721. Defendant was not denied a fair and impartial trial. *Abraham, supra* at 272.

X. RESENTENCING & SCORING

Defendant also argues that he is entitled to resentencing. We disagree.

A. Standard of Review

This sentencing issue was not preserved for appeal. Therefore, defendant must satisfy the plain error standard in *Carines, supra*, 460 Mich at 763. See *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

B. Analysis

The United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), did not preclude the trial court from engaging in judicial fact-

finding in scoring the offense variables used to establish the sentencing guidelines range. See *People v Drohan*, 475 Mich 140; 715 NW2d 778(2006).

We also agree that the evidence supports the trial court's scoring decisions for OV 7 and OV 10. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Fifty points may be scored for OV 7 where “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37. The focus of this variable is on the defendant's conduct and purpose with respect to aggravated physical abuse. *People v Kegler*, 268 Mich App 187, 191; 706 NW2d 744 (2005). The victim's trial testimony that defendant shot him in the arm and then pointed the gun at his face and, while smiling, shot him in the eye, supports a finding that defendant treated the victim with excessive brutality and engaged in conduct designed to substantially increase the victim's fear and anxiety while committing the offense. Thus, the trial court properly scored OV 7 at 50 points.

Fifteen points may be scored for OV 10 if predatory conduct was involved. MCL 777.40. “Predatory conduct” means “preoffense conduct directed at the victim for the primary purpose of victimization.” MCL 777.40(2)(a). Watching and waiting for a victim are factors of predatory conduct. *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004), lv gtd 474 Mich 1099 (2006); see also *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), aff'd 470 Mich 305 (2004). The trial evidence that defendant watched both the victim and his former girlfriend during the week preceding the shooting, followed them as they were going to work on the date of the offense, and then waited for them afterward as they returned home from work, supports a finding that defendant was engaged in preoffense conduct directed at the victim for the primary purpose of victimization. We therefore affirm the trial court's decision to score 15 points for OV 10.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette