

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY MARTIN WOKOSIN,

Defendant-Appellant.

UNPUBLISHED

June 21, 2012

No. 304082

Berrien Circuit Court

LC No. 2010-003552-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82. Because the trial court did not err by admitting evidence involving witness intimidation, defendant waived appellate review of his challenge to the admission of evidence under MRE 404(b), the prosecutor did not commit misconduct, and defendant was not denied the effective assistance of counsel, we affirm.

Defendant's convictions stem from his assault of Robert Alan Patzer with a baseball bat on July 25, 2010. Defendant struck Patzer several times with a baseball bat in retaliation for Robert's assault of Richard Hensel earlier that day. Defendant was dating Hensel's aunt and was angry that Patzer had assaulted Hensel, whom defendant considered a relative.

Defendant first argues that the trial court erred by admitting Lashonda Perry's testimony that defendant tried to convince her not to testify. Because defendant failed to preserve this argument by objecting to Perry's testimony during trial, our review of this issue is limited to plain error affecting his substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). To satisfy this standard, a defendant must show that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the error affected substantial rights, i.e., it was outcome determinative. *Id.* "[R]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of guilt or innocence." *Id.*

Perry testified that, a few days before trial, defendant attempted to convince her not to testify. They discussed what could happen to Perry if she did not come to court, and Perry characterized the conversation as "pretty friendly." The night before trial, defendant again spoke with Perry and more aggressively tried to dissuade her from testifying. He raised his voice

during that conversation and told her that nothing could happen to her if she did not come to court. Defendant contends that the trial court erred by admitting evidence involving the conversations because he did not threaten Perry and the conversations were too benign to amount to witness intimidation.

“Evidence that a defendant made efforts to influence an adverse witness is relevant if it shows consciousness of guilt.” *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). “Under MRE 402, relevant evidence is admissible unless excluded by the state or federal constitution or by a rule of evidence.” *Id.* at 236. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Here, defendant’s repeated attempts to dissuade Perry from testifying were relevant as demonstrating his consciousness of guilt. Notably, Perry was the only witness, aside from Patzer, who testified that defendant had a baseball bat at the time of the incident. Defense witness Henry Kukec testified that he did not see anything in defendant’s hands. Similarly, defendant’s girlfriend testified that defendant was not holding anything, that he did not own a baseball bat, and that she saw Patzer fall down the stairs while he was arguing with defendant. During closing argument, defense counsel suggested that Patzer sustained his injuries when he fell down the stairs. Thus, evidence of defendant’s attempts to dissuade Perry from testifying were relevant to show his consciousness of guilt.

Further, the evidence was not unfairly prejudicial. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” MRE 403. “In this context, prejudice means more than simply damage to the opponent’s cause. A party’s case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion.” *Schaw*, 288 Mich App at 237 (quotation marks and citation omitted). “Instead, evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Id.* (quotation marks, citation, and brackets omitted). Considering that Perry’s testimony was the only testimony that corroborated Patzer’s claim that defendant was holding a baseball bat, defendant’s attempts to convince Perry not to testify were not merely marginally probative. Rather, they pertained to a key issue in the case. Accordingly, defendant has failed to demonstrate that the admission of the evidence constituted plain error.

Defendant also argues that the trial court erred by admitting the testimony of Alysia Babcock, Perry’s supervisor, who testified that defendant twice glared at Perry when he saw her at the courthouse on the morning of trial. We review this unpreserved issue for plain error affecting defendant’s substantial rights.¹ *Coy*, 258 Mich App at 12.

¹ When the prosecutor initially indicated his intent to call Babcock as a witness, defense counsel questioned how her testimony was relevant. In response, the prosecutor requested “a second to think” and stated, “let me think about it this evening[.]” When the trial court revisited the issue the next morning, the prosecutor indicated that he intended to call Babcock as a witness, stating that the fact-finder may properly consider a defendant’s attempt to induce a witness not to testify

Defendant argues that Babcock's testimony did not evidence his consciousness of guilt because Perry did not see defendant glare at her. Defendant also contends that Babcock's testimony did not show that he attempted to intimidate a witness to prevent her from testifying because Babcock did not witness the incident giving rise to the charges. Contrary to defendant's argument, Babcock's testimony that defendant glared at Perry in a "frightening" and "evil" manner was relevant to show his consciousness of guilt. Regardless of whether Perry looked at defendant and saw him glaring at her,² the fact that he did so demonstrated his ongoing attempt to intimidate Perry and coerce her not to testify. As previously discussed, this evidence was relevant and not merely marginally probative. Therefore, defendant has failed to demonstrate that the trial court plainly erred by admitting Babcock's testimony.

Further, defendant argues that the combined effect of the witness intimidation testimony denied him due process of law and rendered his trial fundamentally unfair. Defendant focuses on the fact that, during its deliberations, the jury sent a note to the trial court asking to review Perry's testimony regarding her conversations with defendant. Defendant contends that the note shows that the witness intimidation testimony played a key role in the jury's decision. Because the testimony was properly admitted, however, the jury was permitted to consider it in rendering its verdict. Defendant's argument that the jury's consideration of the evidence denied him a fair trial and due process of law lacks merit.

Defendant next argues that the trial court erred by admitting evidence of his previous altercation with Patzer under MRE 404(b). Because defendant waived appellate review of this issue, however, appellate review is precluded. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). The parties and trial court engaged in the following discussion:

THE COURT: So, is there another issue you want to address now or should we put Mr. Patzer on the stand and take care of the—the evidentiary issue that you wanna [sic] resolve?

MR. SANFORD [the prosecutor]: Judge, I don't know that I understand your question. The only issue I had is the 404b.

THE COURT: Okay.

MR. MILLER [defense counsel]: We're not going to object to that testimony.

THE COURT: You're not going to object to [it]?

MR. MILLER: No.

because it pertains to the defendant's consciousness of guilt. Defense counsel did not object at that point and did not object before Babcock testified.

² Perry testified that she looked away from defendant when he walked into the waiting area because she did not want to make eye contact with him.

THE COURT: Fine. Then we don't have an issue there.

Waiver is “the intentional relinquishment or abandonment of a known right.” *Id.* at 215 (quotation marks and citations omitted). “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *Id.* (quotation marks and citations omitted). By specifically indicating that he had no objection to the admission of the 404(b) evidence, defendant waived appellate review of his challenge to the evidence.

Defendant next argues that the prosecutor committed misconduct during his rebuttal closing argument by impermissibly vouching for Patzer's and Perry's credibility and referencing Patzer's prior consistent statements. We generally “review de novo claims of prosecutorial misconduct to determine whether [a] defendant was denied a fair and impartial trial.” *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). Because defendant did not preserve any of his claims of error, however, our review is limited to plain error affecting his substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

During closing argument, defense counsel argued that Patzer's recollection was “foggy” and questioned why the police did not recover a baseball bat if defendant used a bat to assault Patzer. Counsel further argued that Patzer sustained his injuries when he fell down the stairs. In response, the prosecutor argued as follows:

Let's talk about the bat. Mr. Miller's [i.e., defense counsel's] logic is apparently this. Because the police never seized the bat, there must not have been a bat, which is horrible logic. That's like saying someone died of a gunshot wound but we didn't recover the bullet and we didn't find the gun, so he must've died from something else, not a gunshot wound. . . . Again, why was there a bat? Well Mr. Patzer told us so. He's got no motive to lie about who would have hit him with what. . . .

Mr. Patzer's testimony was consistent with everything he told the police from the start. When he called 9-11 [sic], [he] said he got hit with a bat. When the police got out there, he told them he got hit with a bat. When he went to the doctor 5 days later, he told his physician he got hit with a bat. When he was here in trial in front of you, he told you he was hit with a bat. Story never wavered, never changed no matter who he was telling it to. That's evidence of the bat.

Miss Perry, whose credibility should be beyond reproach, said she saw the defendant holding a bat. Two people saw the bat.

* * *

Everything, every piece of evidence you have points to Mr. Patzer being hit with a bat.

* * *

Every piece of credible evidence points to the bat.

A prosecutor may not “vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness’ truthfulness.” *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may, however, argue from the facts and testimony that a witness is credible or worthy of belief. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007); *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). A prosecutor may also properly argue that a witness has no reason to lie. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Further, a prosecutor’s remarks must be considered in light of defense counsel’s argument, *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997), and even improper comments “may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Here, the prosecutor did not improperly suggest that he had special knowledge concerning Patzer’s and Perry’s truthfulness. Rather, he argued from the evidence that their testimony that defendant had a baseball bat was credible. Such argument was proper. *Dobek*, 274 Mich App at 66; *McGhee*, 268 Mich App at 630. Moreover, the prosecutor’s argument properly responded to defense counsel’s argument that Patzer was injured when he fell down the stairs and that Patzer’s recollection that defendant had a baseball bat was “foggy.” See *Messenger*, 221 Mich App at 181; *Kennebrew*, 220 Mich App at 608.

Further, defendant’s argument that that prosecutor impermissibly referenced Patzer’s out-of-court statements lacks merit. A prosecutor may properly argue the evidence, and all reasonable inferences arising from the evidence, as it relates to his theory of the case. *Bahoda*, 448 Mich at 282. At trial, Patzer testified that he told the 911 operator and the responding police officer that he was beaten with a baseball bat. In addition, Patzer’s physician testified that Patzer told him that he had been hit with a baseball bat. This testimony was admitted without objection by defense counsel. Because the statements were admitted as evidence, the prosecutor was free to reference the statements in his rebuttal closing argument. Thus, defendant fails to show that the prosecutor’s argument constituted plain error.

Finally, defendant contends that his trial counsel rendered ineffective assistance by failing to object to Perry’s testimony about her conversations with defendant, the MRE 404(b) evidence, and the prosecutor’s improper vouching. Because defendant failed to preserve this issue for our review by moving for a new trial or a *Ginther*³ hearing below, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to prove ineffective assistance of counsel, a defendant must demonstrate that: (1) his counsel’s performance fell below an objective standard of reasonableness, and (2) it is reasonably probable that the result of the proceeding would have been different but for counsel’s alleged error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Counsel is presumed to have rendered effective assistance of counsel, and the defendant has the burden of proving otherwise. *Id.* A defendant must overcome the presumption that counsel’s challenged

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

action constituted sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

With respect to counsel's failure to object to Perry's testimony and the alleged prosecutorial misconduct, defendant has failed to establish prejudice. As previously discussed, Perry's testimony was properly admitted and the prosecutor's arguments were not improper. Thus, defendant cannot establish a reasonable probability of a different result had counsel objected. See *Frazier*, 478 Mich at 243. "Counsel is not required to raise meritless or futile objections, and thus defense counsel was not ineffective." *People v Moorner*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

With respect to counsel's failure to object to the admission of the MRE 404(b) evidence, defendant has failed to overcome the presumption that counsel's decision constituted sound trial strategy. The evidence admitted under MRE 404(b) involved an altercation between Patzer and defendant that occurred a few months before the incident giving rise to this case. The altercation involved a lawnmower that Patzer was storing for a friend. Patzer saw Kukec using the lawnmower without his permission as Patzer was driving down the street. According to Patzer, he shook his finger at Kukec, and defendant ran across the driveway and tried to pull Patzer out of his car. Kukec, on the other hand, testified to a different version of the story. Kukec maintained that Patzer slammed on his brakes, accused Kukec of stealing the lawnmower, and was "going ballistic." Kukec testified that when defendant approached Patzer's car, Patzer wanted to fight defendant. Thus, the record shows that counsel's failure to object to the admission of the evidence constituted sound trial strategy to portray Patzer as the aggressor in the altercation. This is consistent with defense counsel's closing argument that Patzer was "the bully," was "out-of-control upset," was intoxicated, and had come to Hensel's home "to finish the job that he started earlier in the day." Because counsel's decision not to object to the evidence constituted sound trial strategy, defendant's claim of ineffective assistance lacks merit. *Johnson*, 451 Mich at 124.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens