

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON W. ADAMS,

Defendant-Appellant.

UNPUBLISHED

June 28, 2002

No. 231244

Wayne Circuit Court

LC No. 99-011559

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Defendant was convicted of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and reckless use of a firearm, MCL 752.863a. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of twenty-one months to six years for the felonious assault conviction and ninety days to three months for the reckless use of a firearm conviction, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On October 17, 1999, Billie Sue London, the thirty-six-year-old victim, was driving in her Ford Explorer. She was crying because she learned that her previous boyfriend had a new girlfriend. At some point, she pulled off the highway and into the parking lot of a trucking business. She sat in her car and continued to cry. Defendant, who worked at the trucking company, noticed the victim's Explorer in the parking lot and approached. He attempted to talk to the victim for several minutes. Eventually, she conversed with him. Defendant appeared to have good intentions, and he asked her if she would like to go somewhere to talk. With the victim's permission, defendant entered her vehicle. She allowed him to drive. They first stopped at a liquor store and bought gin. They then went to the home of defendant's uncle.

The victim testified that she met defendant's uncle and sister at the house. They were friendly to her. The victim and defendant stayed at the home for twenty to thirty minutes. The victim testified that she did not cuddle up to defendant while there. She also testified that she did not drink alcohol while there. She further claimed that she only consumed two alcoholic drinks the entire evening. According to defendant's uncle, defendant's nephew and defendant's cousin, who were all present at the uncle's home, the victim consumed alcohol in front of them and cuddled with or rubbed defendant. Defendant's relatives testified that defendant did not drink any alcohol at his uncle's house, although it appeared that he consumed alcohol before arriving.

The victim testified that after she and defendant left his uncle's house, they went to defendant's home, which was undergoing renovation. The victim noticed a rifle by the door when she first entered the house. Defendant explained that he kept the rifle for protection. The victim, while disturbed by the presence of the rifle, did not leave. She looked through the whole house. She testified that it was obvious that the house was in the midst of renovation. At some point, defendant called and ordered a pizza. When he left to pick it up, the victim went to the upstairs bedroom, which was the only furnished room. She watched television.

When defendant returned with the pizza, they ate it in the bedroom and watched television. The victim testified that ten or fifteen minutes after they started eating, defendant exited the bedroom to go to the bathroom. When he returned, he slammed the door to the bedroom and turned out the lights. He ripped his clothes off and shouted obscenities at her, indicating that he was going to "f***" her. The victim testified that she was scared. When she tried to stand up from the floor, he grabbed her sweat pants and pulled them, along with her underwear, down to her knees. She fell to the floor, thinking defendant was going to rape her. Defendant was standing in front of her. He was naked and he threatened her. She could not leave the room because the door was closed. The victim testified that in order to calm defendant, she agreed to "do it" with him but first, she asked to go to the bathroom. When she tried to crawl around defendant, he grabbed at her sweatshirt and yanked at it. She pulled away, stood up, and ran to the window. While the window opened, there was a storm window inserted and thus, she could not scream out for help. She turned to face defendant and kept screaming. The victim testified that defendant did nothing more. He started eating his pizza again. She tried to leave the bedroom but the door was locked. Defendant opened it for her. At that point, she noticed that the rifle was leaning against the door. Defendant subsequently walked the victim downstairs and let her out of the front door. He carried the gun with him.

The victim ran to her Explorer and jumped into it. She backed out of defendant's driveway. She decided to park in front of the house across the street because she noticed that the porch light was illuminated. After parking, she ran to the door of the neighbor's house and banged on it, screaming for help. The neighbor, David Isabelli, eventually answered the door and let the victim inside his house. He called the police for her.

The victim testified that after Isabelli telephoned the police, she sat down on his couch. While sitting there, she heard gunshots come from the direction of defendant's house. She was scared. She thought defendant may point the gun at her through Isabelli's windows. Therefore, instead of waiting for the police, she ran back outside to her car. At that point, she noticed that the back window was shattered. There were bullet holes in the front windshield. Defendant was outside and she screamed at him, asking why he did this to her. Defendant walked down his driveway, carrying the rifle. The victim testified that she heard a click. Defendant pointed the gun at her¹ and said, "bitch, if you don't get out of here, I'll kill you." She felt threatened. She managed to get into her car and drive away. As she did, she heard more gunshots.

¹ At the preliminary examination, the victim testified that defendant shot the gun up in the air. In her statement to the police, she indicated that she could not see if defendant was pointing the rifle in her direction. She "felt" he was shooting at her.

Isabelli testified that he reluctantly answered the door when he heard the victim screaming for help. The victim was panic stricken and indicated that “he” tried to rape her. Isabelli called the police and he also obtained the victim’s name, address and telephone number. The victim sat on his couch and waited. While waiting, they heard two or three gunshots. Isabelli testified that the victim was frightened and dove to the floor. After that, she decided not to stay at Isabelli’s house. She left, indicating that she wanted to forget about “it.” Once outside, the victim sat on the street curb. Isabelli testified that he did not see anyone outside and that he yelled at the victim to go to the police. The victim walked to her vehicle. She subsequently called to Isabelli to come and look at it because “he” had blown the windows out of it. Isabelli did not go to look. He again told the victim to go to the police. Isabelli testified that the victim was very upset. She went into the middle of the street and started screaming in the direction of defendant’s house, asking why he did this to her. Isabelli watched a man exit defendant’s house. The man said, “bitch, if you don’t shut up, I’m going to f***ing kill you.” There were two or three more shots after that time. The shots came from the person who left defendant’s house. The victim got into her vehicle and “hightailed” it out of the neighborhood.

The police eventually came to Isabelli’s house. While the police were talking to Isabelli, defendant exited his house and walked to a taxicab that had pulled up in front. Isabelli pointed defendant out to the officers. One of the officers testified that defendant was carrying a loaded, .22 caliber rifle as he walked to the taxicab. He was carrying it at his side, trying to conceal it. He was walking casually. Defendant was arrested. While he smelled of intoxicants, he spoke clearly to the officers. He was cooperative and not hostile. He had a little bottle of whiskey in his possession.

The victim did not go to the police that evening or the following day. She testified that she did not do so because the crime was already reported and because she was too scared to do anything more. On Sunday, October 19, 1999, the police contacted her. She thereafter made a full statement to the police. The victim denied telling the police that she met defendant at a party, was intoxicated, and asked defendant to drive her home. Investigator Brenda Stevenson testified that when she first spoke to the victim on the telephone, the victim indicated that she met defendant at a party, that she was very intoxicated, and that she asked defendant to drive her home.

The jury acquitted defendant of a charge of assault with intent to commit criminal sexual penetration, MCL 750.520g(1). They convicted defendant, however, of felonious assault, reckless use of a firearm, and felony-firearm.

I

Defendant first argues that the trial court abused its discretion by excluding similar acts evidence that the victim previously made false charges against other men. The trial court ruled that the evidence was inadmissible propensity evidence and that any probative value it may have was outweighed by its prejudicial effect. The admission of similar acts evidence pursuant to MRE 404(b) is reviewed for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

If an error is found, defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. No

reversal is required for a preserved, nonconstitutional error "unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." [*Id.*, citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).]

MRE 404(b) is not limited to the admission of evidence of a criminal defendant's other wrongs or bad acts but, by its clear language, it encompasses the acts of any person, including the victim. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991).

Pursuant to MRE 404(b), evidence of other crimes or wrongs "is not admissible to prove the character of a person in order to show action in conformity therewith." However, other acts evidence may 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." MRE 404(b). Other acts evidence must be offered for a proper purpose under the rule, the evidence must be relevant, and its probative value must not be substantially outweighed by unfair prejudice. [*Knapp, supra* at 378-379, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

It is insufficient for the proponent of the evidence to merely recite one of the purposes articulated in MRE 404(b). *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The proponent must also explain how the evidence relates to the recited purposes. *Id.*

Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. . . . The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.* at 387-388 (citation omitted).]

In this case, defendant wanted to admit evidence that the victim had previously accused another man of breaking out her car window. Defendant indicated that the man was willing to testify that the victim's accusation was false and that he obtained a personal protection order against the victim. In addition, defendant wanted to admit evidence that the victim previously obtained a personal protection order against another man for threatening and harassing her. Defendant argued a laundry list of reasons for admitting the evidence under MRE 404b, specifically that the evidence was being offered to show "her overall scheme, plan, system and motive, absence of mistake or accident." Defendant argued that the victim was always perceiving that men were trying to hurt and kill her and that she is therefore likely to mislead and distort.

The trial court did not abuse its discretion by excluding the similar acts evidence. First, defendant merely recited a laundry list of reasons under MRE 404(b). He has not demonstrated, either in the trial court or this Court, that the evidence had any logical relevance except with respect to the prohibited argument that, because the victim had falsely accused in the past, she must be doing so in this case, i.e., that the character of the victim was such that she made false accusations against men before and that, acting in conformity with that trait, her accusations in

this case must be false. This is improper propensity evidence under MRE 404(b). Not only did defendant fail to articulate a proper purpose or demonstrate logical relevance, he fails to acknowledge that there was a severe potential for unfair prejudice if the evidence was admitted. The trial court properly recognized that the evidence sought by defendant was improper, prejudicial propensity evidence. Its exclusion was not an abuse of discretion.

We further note that even if there was an abuse of discretion, reversal would not be warranted. It cannot be said that any error with respect to the evidence was, more probably than not, outcome determinative. *Lukity, supra* at 495-496. Defendant was acquitted of the charge of assault with intent to commit criminal sexual penetration. He was convicted only of the assault charges related to the gun. The victim's testimony alone did not support the conviction on the charges related to the use of the rifle. The victim's testimony was corroborated by Isabelli, who saw a man exit defendant's house, heard the man threaten to kill the victim if she did not shut up, and heard shots following the threat.

II

Defendant next argues that his counsel was ineffective for failing to pursue a defense of voluntary intoxication. Our review of the ineffective assistance claim is limited to errors apparent on the record because no *Ginther*² hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 577 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

[A] diminished capacity defense, such as voluntary intoxication, is only available where it is shown that a defendant's impairment rendered him unable to formulate the specific intent to commit a crime. It is not available where testimony establishes only that a defendant could not fully appreciate the consequences of his actions. [*People v Flaherty*, 165 Mich App 113, 123-124; 418 NW2d 695 (1987) (citation omitted).]³

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

³ We note that our Supreme Court has recently rejected the "diminished capacity" defense in the context of a defense based on mental impairment. *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001). The *Carpenter* Court stated:

The Legislature has enacted a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation. We conclude that, in so doing, the Legislature has signified its intent not to allow evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent. Rather, the insanity defense as established by the Legislature is

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In this case, the victim testified that she did not know how much alcohol defendant consumed. She speculated that he was acting crazy because of alcohol consumption but she did not know. She also did not recall seeing him with a pint of whiskey at any time. Defendant's relatives testified that they did not see defendant drinking alcohol while at his uncle's home. The victim's nephew specifically testified that defendant was not intoxicated. Further, defendant's uncle testified that, while it appeared that defendant had consumed a few drinks, he was not drunk. There was no testimony that defendant drank alcohol at his uncle's house or at any point thereafter before the commission of the crime. When the police arrested defendant, after the crime, he smelled of intoxicants, and he had a whiskey bottle with him. However, he spoke clearly to the police and was cooperative. Under the circumstances, it is not apparent from the record that defendant was so intoxicated that he could not form the requisite intent to commit the felonious assault. Therefore, counsel's decision not to pursue the defense was not objectively unreasonable.

Counsel chose to argue for acquittal on the felonious assault charge by discrediting the victim's testimony that defendant pointed the gun *at* her. Counsel was successful in eliciting that plaintiff gave contradictory testimony on this point at trial, at the preliminary examination and in her statement to police. In her closing argument, defense counsel argued that the evidence did not support that defendant pointed the gun at the victim and that, while he may have committed the misdemeanor of reckless discharge of a firearm, he did not commit felonious assault. The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Defendant cannot demonstrate that but for counsel's failure to pursue the defense of voluntary intoxication he would have been acquitted. *Stanaway, supra* at 687-688.

III

Defendant next asserts several allegations of prosecutorial misconduct. He argues that the prosecutor denigrated and badgered the defense witnesses by asking them why they did not tell their stories to the police before trial and by arguing that their testimony was fabricated. Defendant also argues that the prosecutor improperly denigrated his witnesses' knowledge of the specific allegations and improperly asked one witness to comment on defendant's truthfulness.

This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. Concerning preserved issues of prosecutorial misconduct, this Court evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial. Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error.

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the sole standard for determining criminal responsibility as it relates to mental illness or retardation. [*Id.*]

The holding does not effect our decision today because here the defense is based on intoxication, and regardless, we reject defendant's argument on other grounds.

Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. [*People v Kris Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001) (citations omitted).]

At trial, the prosecutor asked each of defendant's three testifying relatives whether they were aware of what occurred after the victim and defendant left the home of defendant's uncle. None of them knew what occurred because they were not present at or around defendant's house at the time of the crimes. Defense counsel did not object to this line of questioning. The prosecutor also asked each of defendant's three testifying relatives about the fact that they never told their version of the events to the police before trial. Defendant objected to this line of questioning. During closing argument, the prosecutor argued:

Or the family, Mr. Adams' family, comes in here, no one knows squat what goes on after they leave that house, they're all drinking at the house, but they've got this monumental evidence but they don't tell the police. Why would you tell the police? You don't want to do that. You want to save it for the day of trial and spring it on everybody because it didn't happen.

* * *

Because it didn't happen, they can't testify. Matter of fact, they're ready to give their opinion right off the bat of what happened. Based on what?

During the course of this argument, defense counsel objected, indicating that the evidence was not sprung on anyone and that the prosecution had access to the witnesses. The objection was overruled. The prosecutor subsequently argued that defendant's relatives fabricated their testimony to protect defendant.

It was not improper for the prosecutor to question defendant's relatives about why they failed to come forward and tell the police their version of what occurred at the home of defendant's uncle. The witnesses' testimony was designed to enhance defendant's argument that the victim was not credible, particularly with respect to her allegations of assault with intent to commit criminal sexual conduct. The witnesses also tried to bolster defendant's claim that the victim wanted something from him, and that she fabricated the allegations when she did not get what she wanted. Toward this goal, defendant's relatives testified that the victim was touching, rubbing, and "necking with" defendant before they left his uncle's house. It is settled that the credibility of an alibi witness may be tested by questioning about why he failed to come forward before trial with evidence that would assist the defendant. *People v Phillips*, 217 Mich App 489, 494-496; 552 NW2d 487 (1996). In *Phillips, id.* at 494, this Court agreed that information about why a witness failed to come forward is helpful to assist the trier of fact in determining whether the testimony is an accurate reflection of truth or whether it is a recent fabrication. Further, in *People v Smith*, 149 Mich App 189, 192-193; 385 NW2d 654 (1986), this Court held that a prosecutor may properly argue that a "witnesses' delay in reporting [] exculpatory information to the police on behalf of defendant meant that the witnesses had an opportunity to coordinate their stories." While not alibi witnesses, the witnesses in this case knew that defendant, their relative, had been charged with serious crimes, including assault with intent to commit criminal sexual penetration. They saw defendant and the victim shortly before the alleged crimes occurred and

they observed the victim's demeanor. Yet, they never came forward to give the helpful information to the police or prosecutor. We conclude that defendant was not denied a fair trial because of the prosecutor's questions, which assisted the jury in determining whether the testimony was credible. Further, the prosecutor's closing argument that the witnesses fabricated their version of events was proper comment on the evidence and the reasonable inferences to be drawn from it. In *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), the Court stated:

“[P]rosecutors are accorded great latitude regarding their arguments and conduct.” They are “free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” [Citations omitted; alteration in original.]

A prosecutor is not required to state inferences or conclusions in the blandest terms possible. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). He is allowed to argue from the facts that a witness is not worthy of belief. *Id.*

We similarly find no misconduct in the prosecutor's questioning of defendant's relatives about whether they had first-hand knowledge of the details of the alleged crimes or first-hand knowledge of anything that occurred after the victim and defendant left the home of defendant's uncle. Defendant called his relatives as witnesses to try and demonstrate that the victim was not truthful. Questioning the witnesses about what they actually knew about the events that led to the charges was therefore appropriate. We further find that the record does not support that the prosecutor unfairly badgered the witnesses. The questions about specific details were based on the testimony already given by the victim. The jury had thus already heard the detailed information and the prosecutor simply confirmed that the witnesses had no knowledge about it. Defendant cannot demonstrate the existence of a plain error and, even if we accepted that the questioning was improper, defendant cannot demonstrate that questioning the witnesses about what they did not know affected the outcome of his trial. Thus, reversal is not required.

We also find no merit to defendant's complaint that the prosecutor denigrated his female cousin by asking her if she had a hard time hearing his question. Defense counsel objected when the prosecutor asked the question, indicating that the witness had already answered it. Thus, the issue is preserved. Nevertheless, we find that defendant was not denied a fair trial by the question. The prosecutor asked the witness whether she had spoken to defendant. The witness answered, “no.” The prosecutor followed up by asking if she had ever talked to him since his arrest. The witness did not answer “yes” or “no” but rather, she began to explain. The prosecutor interrupted and asked the question again. The witness indicated that she could not answer. The prosecutor asked the question again, “[h]ave you talked to Aaron Adams since he was arrested back on October of 1999?” Only then did the witness answer that she talked to defendant after he got out of jail. The prosecutor next asked whether the witness and defendant talked about the case. The witness gave a nonresponsive answer. The prosecutor needed to ask the question a second time before the witness answered. The prosecutor followed up the answer by asking if the witness told defendant that she recalled seeing the victim cuddling him at their uncle's home. After the witness gave a nonresponsive answer, the prosecutor asked the question again and asked the witness if she had a hard time hearing the question. Given the witness' argumentative and nonresponsive manner in answering the prosecutor's questions, the question at issue was appropriate. Defendant was not deprived of a fair or impartial trial because of the isolated question.

Defendant finally complains that the prosecutor improperly questioned his former employer, asking the employer to comment on defendant's truthfulness. The prosecutor asked the witness whether he discussed the case with defendant and whether defendant gave information about the case. The witness indicated that he and defendant had discussed the case. The prosecutor subsequently inquired whether the witness knew if the information imparted by defendant was true or was a lie; whether it was fact or fiction. The witness indicated that he had no way of knowing what really occurred. The prosecutor did not ask the witness to comment on defendant's credibility. Rather, he attempted to determine if the witness had any first hand knowledge of the events leading to the charges, and whether he could confirm the truth of defendant's statements. This was not improper. Even if we were to construe the question as improperly soliciting comment on defendant's credibility, we would find no error requiring reversal based on this unpreserved issue.⁴ Defendant cannot and has not demonstrated that any error with respect to the questioning affected the outcome of his trial. Indeed the witness did not indicate that defendant was untruthful. He indicated that he did not know.

In sum, we have reviewed both the preserved and unpreserved allegations of prosecutorial misconduct and found that defendant was not deprived of a fair trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray

⁴ Although defense counsel objected to the line of questioning on the ground that it was outside of the scope of her direct examination, she did not object on the ground now asserted on appeal. An objection on one ground is insufficient to preserve an appellate attack on another ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).