

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JAMES WAPPLER,

Defendant-Appellant.

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UNPUBLISHED

August 23, 2002

No. 229485

Oakland Circuit Court

LC No. 99-169074-FH

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b.<sup>1</sup> The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to twenty months to eight years in prison for the felonious assault conviction and two consecutive years in prison for the felony-firearm conviction. We affirm.

I.

Defendant first argues that the trial court erred in admitting the victim, Nancy Wappler's, hearsay statements. The decision to admit evidence is within the trial court's discretion and should only be reversed if there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant claims that Wappler's statements in the 911 call and to Deputy Steven Clark do not meet the requirements of the hearsay exceptions of excited utterance, MRE 803(2), and present sense impression, MRE 803(1), because there was insufficient independent corroboration that the underlying assault occurred. While independent proof that the event took place must be presented to invoke the excited utterance exception, circumstantial evidence of the event is sufficient. *People v Kowalak (On Remand)*, 215 Mich App 554, 559-560; 546 NW2d 681 (1996). Likewise, the sufficiency of the corroboration to support the present sense impression exception depends on the particular circumstances of the case. *People v Hendrickson*, 459 Mich

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<sup>1</sup> Defendant also pleaded guilty to operating a motor vehicle under the influence of intoxicating liquor, MCL 257.625(1), and was sentenced to ninety days in prison.

229, 237-238; 586 NW2d 906 (1998). The independent evidence requirements for the excited utterance and present sense impression exceptions are analogous. *Id.*

The trial court did not err in finding sufficient circumstantial evidence that the event occurred. Wappler placed a 911 call at approximately 10:56 p.m. by cell phone from the bathroom. Wappler was “shaky” and cried during the conversation. Defendant’s friend, Mark Webber, left the house after hearing the argument between defendant and Wappler and hid in a tree because he was afraid. Webber did not come down from the tree until the police deputies ordered him to do so at gunpoint. Webber appeared fidgety and looked around nervously. When the deputies arrived at the house, as a result of the 911 dispatch, they heard Wappler crying in the bathroom and she would not come out until the 911 dispatcher told her that it was the deputies outside the door and not defendant. Deputy Sauve testified that he found a shotgun in plain view in the garage. The gun was loaded and the safety mechanism was turned off. Defendant drove away after the argument and before the police arrived. Therefore, there was sufficient independent evidence of the assault and the trial court did not err in admitting the 911 call or Wappler’s statements to Deputy Clark.

Defendant also argues that the trial court erroneously admitted Wappler’s written statement despite its earlier ruling that the statement was inadmissible hearsay, but permissible for impeachment purposes. Prior inconsistent statements not “given under oath subject to the penalty of perjury” are hearsay and are only admissible for impeachment purposes, not as substantive evidence. MRE 801(d)(1)(A); *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1982). The record shows that the prosecution did, in fact, offer the written statement only to impeach Wappler’s testimony after she testified that the events as described in the statement did not happen and denied remembering that she wrote portions of the statement.

Wappler’s testimony was entirely inconsistent with her written statement. Wappler testified that she held a gun and announced to defendant that she wanted to kill herself. They argued about this for a while and defendant took the gun from her. Wappler denied that defendant ever threatened her with the gun or in any way. Wappler further testified that she had a psychotic event so she grabbed her Xanax and her cell phone and went into the bathroom. While in the bathroom, she decided to eliminate defendant so she could kill herself. To effectuate this plan, she called 911. Wappler testified that she had been having dreams about her employer pointing guns at her because she has job anxiety. In contrast, Wappler’s written statement indicates that she and defendant had an argument in which defendant stated that Wappler was disrespecting him. When defendant came home, he argued further with Wappler ultimately getting a gun and asking her if she wanted to die. Defendant threatened her with the gun for about an hour. Wappler managed to get a cell phone and go into the bathroom from where she called 911. Therefore, the trial court properly permitted the prosecution to impeach Wappler with her written statement because she both denied making it and testified inconsistently with it. Additionally, the trial court adequately instructed the jury on the use of impeachment evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

## II.

Defendant next argues that the trial court erred in admitting other acts evidence. To begin with, defendant argues on appeal that it is impossible to discern whether the redacted 911

tape or the unredacted 911 tape was played at trial. However, it is clear from the lower court record that the redacted tape was played at trial.<sup>2</sup> Because the redacted tape was played, only those statements included in the redacted tape will be discussed.<sup>3</sup>

MRE 404(b) governs the admission of other acts evidence and provides:

(1) 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.

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The trial court did not err in admitting Wappler's statement in the 911 tape, "I'm tired of having guns pointed at me." The statement was consistent with other portions of the 911 tape and described the event at issue rather than other bad acts. Wappler stated, "This has been going on for a couple of hours. Would you like having a gun pointed at you?" Therefore, this evidence was not other acts evidence, but rather, a description of the assault for which defendant was charged.

Defendant argues that the statement, "he's done this before," was improperly admitted. The 911 dispatcher asked Wappler, "Has he done this before?," to which Wappler replied, "Yes." Although this appears to be evidence of other acts, defendant has failed to satisfy his burden as to how this statement, standing alone, more likely than not caused a miscarriage of justice and affected the outcome of the trial. See *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Wappler's written statement, "He has threatened me many times," appears to have been improperly shown to the jury in an enlarged exhibit. The prosecutor displayed the exhibit and moved for its admission. However, defense counsel immediately objected and the trial court ordered that it be removed from the jury's view until the trial court could rule on its admission.

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<sup>2</sup> The prosecutor, defense counsel, and the trial court discussed the redactions in a bench conference after which the trial court instructed the jury that portions of the tape were redacted.

<sup>3</sup> The statements: "He's been physical before," "He did that a few weeks ago. He asked me if I wanted to die, do you really want to die now, pointing the gun at me," and "He's put it to my head before and cocked it" were all redacted from the 911 tape that was played at trial.

However, because the trial court required that the exhibit be removed seconds after it was displayed, it is not more probable than not that a miscarriage of justice occurred. *Knapp, supra*. Additionally, the enlarged exhibit contained Wappler's entire written statement. Thus, it is unlikely that the jury would have had time to read the entire exhibit and pick out the objectionable phrase. The trial court ultimately ruled that the phrase be redacted and the redacted version was exhibited from that point forward. Accordingly, we find no error requiring reversal.

Finally, deputy Clark's testimony, "This happened in the past, she didn't want it to happen again," was not improperly admitted. Because defendant failed to object to the admission of this remark, we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Wappler testified at trial that defendant did not assault her. She also testified that Deputy Clark's report about her oral statement was a fabrication. Because the evidence was not admitted for an improper purpose, but rather, to rebut Wappler's testimony, it was not improperly admitted. Thus, we find no plain error affecting defendant's substantial rights. For these reasons, the trial court did not abuse its discretion in admitting other acts evidence.

### III.

Defendant next argues that the trial court erred in denying his motion to correct an error in the presentence investigation report (PSIR). A defendant may not challenge the accuracy of a PSIR on appeal unless the issue was raised at or before sentencing or he demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C); *People v McGuffey*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 227957, issued April 30, 2002), slip op p 5. Although defendant made several arguments at sentencing regarding the accuracy of the PSIR, he did not raise any of the inaccuracies that he raises in this appeal. Further, although defendant raised these inaccuracies in a motion brought sixteen days after he was sentenced, he has not demonstrated that the challenge was brought as soon as the inaccuracies could reasonably have been discovered. Therefore, this issue is not properly preserved for appeal.

Defendant also contends that the trial court abused its discretion in imposing the maximum sentence for defendant as a third habitual offender. This Court reviews sentencing issues for an abuse of discretion. *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001). Defendant points out that the trial court, when sentencing an habitual offender, must exercise discretion and is not required to impose the maximum sentence. Defendant further argues that because the trial court imposed the maximum sentence, it "failed to exercise discretion" and that "[t]he lack of an exercise of discretion is considered an abuse of discretion." This argument simply provides no factual basis for finding that the trial court abused its discretion.

### IV.

Defendant next argues that he was denied a fair trial by prosecutorial misconduct. However, none of the allegations of prosecutorial misconduct were preserved with an objection at trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Therefore, we review those alleged instances of prosecutorial misconduct for plain error affecting defendant's

substantial rights. *Carines, supra*. Defendant complains of eighteen separate instances of prosecutorial misconduct. Based on a review of the record, we find that none of these claims has merit. Accordingly, plain error has not been shown. See *id*.

## V.

Defendant next argues that he was denied the effective assistance of counsel. Because defendant's motion for a new trial was denied, our review of this issue is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's representation so prejudiced defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

On appeal, defendant provides a laundry list of twenty-nine alleged instances of ineffective assistance of counsel, making no argument as to how defense counsel's conduct fell below an objective standard of reasonableness or how defendant was prejudiced by such conduct. However, based on the existing record, we do not believe defense counsel's conduct fell below an objective standard of reasonableness or that defendant was prejudiced by counsel's conduct. Many of defendant's alleged instances of ineffective assistance, including those involving decisions regarding what evidence and witnesses to present, are deemed matters of trial strategy, which we will not second-guess with the benefit of hindsight. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *Rice, supra*. Furthermore, trial counsel is not required to make frivolous motions or advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Similarly, defendant complains of defense counsel's failure to communicate with defendant. But again, there is no basis in the existing record or citation thereto to support these allegations. Defendant also argues that defense counsel was deficient in relation to defendant's motion for a new trial, but defendant provides no citation to the record in support of his factual allegations. To the extent that defendant claims that defense counsel's conduct deprived him of his appellate rights, the fact that this Court has considered defendant's appeal belies the argument. In sum, defendant's laundry list of complaints, with no citations to the record or support therein, provides no basis for this Court to find ineffective assistance of counsel. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citations omitted). Moreover, the appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Leonard, supra*.

## VI.

Defendant next argues that the prosecution presented insufficient evidence to prove beyond a reasonable doubt that defendant was guilty of felonious assault and felony-firearm. In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact's conclusion that a defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* In making such a determination, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

"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." *Avant, supra* at 505. "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." *Id.*

On appeal, defendant argues mainly that Wappler's testimony, in which she denied being assaulted by defendant, proved that the alleged crimes never occurred. However, the jury was free to disbelieve her testimony and this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Terry, supra*. Defendant also bases his argument implicitly on the assumption that Wappler's oral and written statements, including the 911 tape, were inadmissible. However, as previously discussed, this evidence was properly admitted.

At trial, Lori Manning, a 911 dispatcher at the Oakland County Sheriff's Department, testified that at approximately 10:56 p.m. on September 30, 1999, she received a call from Wappler whose voice was shaking as she told Manning that she was hiding in the bathroom and calling by cell phone. Wappler, who cried at times during the conversation, stated that defendant was walking around the house with a gun and wanted to kill her. Webber and Lisoski testified that they heard defendant and Wappler argue. Upon entering the house, deputy Clark heard Wappler in the bathroom crying and he also heard her say, "Oh my God, he's back." Only when the dispatcher told Wappler that the deputies were in the house, did she unlock the door and come out. Deputy Clark also testified that Wappler told him that defendant retrieved the gun from the bedroom, racked it, pointed it at Wappler, and asked her if she wanted to "fucking die." Deputy Jeffrey Sauve testified that he found the gun on top of a pile of wood in the garage. The gun was loaded and the safety mechanism was off. Based on this evidence, rational jurors could find beyond a reasonable doubt that defendant assaulted Wappler with a weapon with the intent to injure or place her in reasonable apprehension of an immediate battery.<sup>4</sup>

## VII.

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<sup>4</sup> This evidence also supports defendant's conviction of felony-firearm, the elements of which are that (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. *Avant, supra*.

Defendant next argues that the trial court abused its discretion in permitting expert testimony about domestic abuse. We disagree. The decision to admit evidence is within the discretion of the trial court. *Starr, supra*. Specifically, defendant argues that the testimony ultimately elicited does not comply with the trial court's order permitting the expert testimony or with *People v Christel*, 449 Mich 578, 591; 537 NW2d 194 (1995), which held that an expert cannot testify that the complainant was a battered woman, that the defendant was a batterer or that he is guilty of the crime, or that the complainant was truthful. First, the fact that the expert testimony went beyond the scope of the trial court's order, which complied with *Christel*, does not render error mandating reversal. Second, the questions posed to and answered by the expert referenced, generally, patterns of abuse and domestic violence. The expert did not testify that Wappler was battered, that defendant was a batterer, or that Wappler was truthful or untruthful. Therefore, the expert testimony itself was not improper. See *id.* Defendant further asserts that the admission of "domestic abuse" testimony prejudiced him because it implied that he was a batterer and that assaults occurred in the past. We find this argument unpersuasive because the expert testimony was relevant, highly probative, and assisted the trier of fact in assessing the credibility of the complainant when she recanted the allegations of the assault. *Id.* at 587-589. Further, although defendant was charged with "felonious assault," the assault was committed on defendant's wife with whom defendant lived, making this a case involving domestic violence. Accordingly, we find no abuse of discretion and defendant's argument is without merit.

#### VIII.

Defendant argues that he was denied due process based on the prosecutor's ex parte communication with the jurors and the substitution of judges during deliberations. Again, because this issue is unpreserved, we review it for plain error affecting defendant's substantial rights, which requires a showing of prejudice. *Carines, supra*. First and foremost, defendant provides absolutely no evidentiary support for his factual allegations regarding improper ex parte communications with the jury. Defendant does cite to the record to show that Judge Howard substituted for Judge Potts. However, we do not find this to be improper. Indeed, these facts do not, in any way, show improper communication with the jury or that defendant was prejudiced by the substitution of Judge Howard for Judge Potts. Therefore, defendant was not denied due process on this basis.

#### IX.

Having determined that each of the foregoing arguments lacks merit, this Court also rejects defendant's claim that the totality of errors denied him a fair trial. *Rice, supra* at 448.

Affirmed.

/s/ Christopher M. Murray  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell