

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
May 20, 2014

v

GLORIA LEMOYNE SMITH,  
Defendant-Appellant.

No. 314433  
Wayne Circuit Court  
LC No. 12-002436-FH

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Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of assault with a dangerous weapon (felonious assault), MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and domestic violence, MCL 750.81(2). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, and received credit for time served for the other convictions. Defendant was also prohibited from having any contact, either directly or indirectly, with the victim. We affirm.

Defendant first claims she was denied the effective assistance of counsel on several grounds. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of law de novo and the trial court's findings of fact for clear error. *Id.* "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). To the extent defendant claims that the trial court erred in failing to grant a new trial on this ground, our review is for an abuse of discretion. *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *Id.*

Both the United States and Michigan Constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a defendant must satisfy the two-part test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Vaughn*, 491 Mich at 669. Specifically, "a

defendant must establish that ‘counsel’s representation fell below an objective standard of reasonableness’ and that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.*, quoting *Strickland*, 466 US at 694. “In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy.” *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011).

First, defendant contends her case was “dead on arrival” when the jury heard defense counsel’s opening statement during which counsel purported to speak as defendant in the first person. Aside from arguing that this statement was improper, defendant makes no attempt to explain why or how counsel’s performance, in making this statement, fell below an objective standard of reasonableness or even prejudiced her. It is not our responsibility to fashion defendant’s arguments, and thus, she has abandoned this claim. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Nevertheless, it is difficult to see how counsel’s opening statement constituted ineffective assistance where the thrust of the statement supported her theory of the case that the victim, an older man, took advantage of defendant’s youth and inexperience. Indeed, this is why the prosecution objected to the statement in the first place. We will not second-guess counsel’s strategy in this regard with the benefit of hindsight. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Second, defendant claims that defense counsel was ineffective for failing to object to the prosecution’s inquiry into defendant’s exotic dancing. At the motion for a new trial hearing, the trial court explained that although its order on defendant’s motion in limine initially precluded this question, the court later determined at side bar during trial that this question was a proper rebuttal to character evidence presented on direct examination of defendant. The specific character evidence at issue was defendant’s testimony regarding her high school activities. This testimony was part of a broader line of questioning attempting to show defendant’s character as one of youthful inexperience and naiveté around the time she was involved romantically with the victim and gave birth to his child. Thus, pursuant to MRE 404(a), the prosecution’s inquiry into defendant’s exotic dancing was offered for a proper purpose to rebut evidence of a character trait offered by defendant. See also *People v Johnson*, 409 Mich 552, 561; 297 NW2d 115 (1980) (stating that a defendant “opens the door only for evidence that his character is not what he claims it to be). Thus, because the trial court properly allowed the question, defense counsel was not ineffective for failing to object, because any objection would have been futile. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Further, even if we were to determine that defense counsel was ineffective for failing to object to the question, defendant cannot establish outcome determinative error where the reference to exotic dancing was very brief and the testimony of three eyewitnesses identified defendant as the assailant.

Third, defendant argues in her Statement of Facts that counsel was ineffective for failing to introduce both the Referee Recommendation and a witness’s written statement to the police, and for failing to adequately question the victim regarding defendant’s handling of the gun. Because this issue was not properly presented for appeal in the statement of questions presented, we need not consider it. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Nevertheless, we find no error where the Referee Recommendation reflects

the parties' testimony regarding the custody arrangement, there was no indication that the witness's written statement conflicted with his trial testimony,<sup>1</sup> and defense counsel's decision not to belabor the victim's testimony about the altercation was a matter of trial strategy.<sup>2</sup>

Defendant next argues that the prosecution's question regarding whether defendant was an exotic dancer denied her a fair trial. We disagree. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights, i.e., outcome determinative error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). The alleged misconduct must be viewed as a whole in light of defense counsel's arguments and the relationship each bears to the evidence presented at trial. *Id.* at 135. As discussed, the prosecution's question regarding whether defendant was an exotic dancer was proper under MRE 404(a). And even if we were to conclude that it was not proper rebuttal character evidence, defendant cannot establish outcome determinative error where three eyewitnesses identified her as the assailant. Accordingly, we conclude that the prosecution's very brief elicitation of testimony regarding defendant's exotic dancing did not deny defendant a fair trial.

Defendant next argues that the evidence was insufficient to support her convictions.<sup>3</sup> We disagree. "Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). In examining the sufficiency of the evidence, we review the record de novo and construe the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). "Circumstantial evidence and reasonable inference that arise from such evidence can constitute satisfactory proof of the elements of the crime," and "[a]ll conflicts in the evidence must be resolved in favor of the prosecution." *Id.*

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<sup>1</sup> Without explanation, the trial court noted in its opinion denying defendant's motion for new trial that introduction of the witness's written statement would have violated MRE 613 (regarding the examination of witnesses concerning prior statements). No evidence appears in the record indicating the basis for this ruling and defendant does not otherwise raise a challenge on this ground.

<sup>2</sup> Defendant does not explain why the failure to enter the Referee Recommendation and the witness's written statement constituted ineffective assistance of counsel. Again, we will not fashion arguments for defendant on appeal. *Kevorkian*, 248 Mich App at 389.

<sup>3</sup> Although defendant styles this claim as one asserting that the verdict was against the great weight of the evidence, defendant's entire brief on this issue pertains to whether the evidence was sufficient to support her convictions.

To establish felonious assault, the prosecution must prove “(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.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). “[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.” *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004) (quotation marks and citation omitted).

Defendant only claims that the prosecution failed to prove that defendant attempted a battery and assaulted the victim with the intent to injure him with a gun. However, evidence was presented that defendant “barged” into the home and demanded to see her daughter before brandishing a handgun and threatening that the victim and his cousin needed to “Get back. I got a CCW.” The victim swore and told defendant to leave while the cousin escorted defendant outside. In describing the entire event, the cousin specifically recounted that “defendant came over there to pick her daughter up forcefully with a gun.” The police affirmed that upon arriving at the scene after the incident, the victim and his cousin were still “very upset.” From this, a reasonable jury could infer minimally that during a heated confrontation, the victim and his cousin were in reasonable apprehension of defendant immediately harming them with a gun, and that defendant intended to create this apprehension in an effort to retrieve her daughter.

Defendant cites *People v Davis*, 126 Mich App 66; 337 NW2d 315 (1983), in support of the proposition that a conviction for felonious assault requires evidence that the gun was pointed at the victim. However, while the defendant did point a gun at the victim in *Davis*, the Court did not find that fact necessary, per se, to sustain a felonious assault conviction. *Id.* at 68-70. And given that the case was decided before November 1, 1990, it is not binding precedent. MCR 7.215(J)(1).

Defendant also makes the conclusory assertion, without any supporting argument, that the evidence was insufficient to support her domestic violence and felony-firearm convictions. Even if defendant had fully argued this issue, however, we briefly note that the evidence was sufficient to support both convictions. Indeed, defendant’s former relationship with the victim and their child in common, coupled with the evidence underlying the felonious assault conviction satisfy the required elements of domestic violence under MCL 750.81(2). Additionally, the witnesses’ consistent testimony regarding defendant’s gun during the assault along with defendant’s assertion that she had a weapon were sufficient to establish both elements of felony-firearm under MCL 750.227b.

Finally, defendant claims the trial court’s inquiry into her failure to attend a custody hearing on August 17, 2011, improperly shifted the burden of proof by creating the inference that she was a bad person and bad mother. We disagree. Defendant appears to frame this issue as implicating MRE 404(b) given her reliance on case law pertaining to that rule. We review this unpreserved error for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

MRE 404(b) generally prohibits the introduction of bad acts evidence, unless offered for the specific purposes delineated in the rule. Evidence of other acts is not what was presented here, however. Instead, the trial court’s questioning regarding whether defendant attended the August custody hearing sought to clarify defendant’s own unclear testimony regarding the

custody arrangement set forth in the Referee Recommendation and her attempts to change that arrangement. This inquiry was proper under both MRE 611(a)(1) and MRE 614(b). Indeed, “a trial court may question witnesses to clarify testimony or elicit additional relevant information.” *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Consequently, the trial court’s inquiry did not suggest an improper inference regarding defendant’s character or shift the burden of proof, let alone constitute outcome determinative error.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Michael J. Kelly