

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEROY ROSE,

Defendant-Appellant.

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UNPUBLISHED

April 21, 2000

No. 208810

Recorder's Court

LC No. 97-000784

Before: Griffin, P.J., and Holbrook, Jr., and J.B. Sullivan\*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of felonious assault, MCL 750.82; MSA 28.277, and second-degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3). Defendant was sentenced to two years and eight months to four years' imprisonment for each conviction. We affirm.

Defendant first argues that the prosecutor was guilty of misconduct for her introduction of other bad acts evidence. We disagree. In reviewing claims of prosecutorial misconduct, this Court must examine the record and evaluate the challenged remarks in context. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). "The test is whether defendant was denied a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). After reviewing the statements in context, we conclude that the prosecutor was not guilty of misconduct.

Additionally, the trial court sustained some of defense counsel's objections to evidence that defendant now challenges, and later instructed the jury that excluded evidence was not to be considered in reaching a verdict. Jurors are presumed to follow the instructions given. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We conclude that defendant was not prejudiced by the prosecutor's introduction of other bad acts evidence.

Even if we were to determine that the challenged testimony amounted to prosecutorial misconduct, reversal is not warranted unless it is more probable than not that the error was outcome

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d

584 (1999), quoting *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Defendant was charged with two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). The trial court instructed the jury that they could consider lesser offenses in determining defendant's guilt. Defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, and second degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3).

We conclude that the challenged testimony was not outcome determinative. The assault element of felonious assault was proven by Carrillo's testimony that she was afraid. Also, a police officer testified that there was a red substance on the hammer which might have been blood. The intent element was proven by Carrillo's description of the assault, and a treating physician's corroborating description of her injuries. Defendant testified that he did not intend to hit Carrillo with the hammer, but admitted he was holding the hammer and he must have hit her with it once. Defendant said that he "freaked out" when Carrillo reached for the shelf where an air gun was kept; however, a police officer testified that he did not find a gun when he searched the house. Given this evidence, the jury could have found that the prosecution proved all of the elements of the felonious assault without considering the testimony regarding the prior abuse.

The second-degree child abuse conviction was also established through the evidence. Carrillo testified that defendant continued to hit her with the hammer while she was holding the child. Carrillo stated that defendant hit the child in the head with the hammer. A treating physician testified that the child had a depressed fracture of the left frontal bone, which was a serious injury. Given this evidence, the jury could have found that the prosecution proved all of the elements of second-degree child abuse without considering the testimony of prior abuse. The challenged testimony was not outcome determinative.

Defendant challenges some of the prosecutor's remarks that were not objected to at trial. Absent objection at trial, review is precluded unless the prejudicial effect of the misconduct could not have been cured by a cautionary instruction or manifest injustice would result by not considering the issue. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). We conclude that defendant cannot establish that the prejudicial effect of the misconduct could not have been cured by a cautionary instruction or that manifest injustice would result from this Court's failure to consider the issue. Therefore, this issue is not properly before this Court, and we decline the opportunity to address these remarks.

Defendant's final argument is that the trial court erred when it admitted evidence of defendant's other bad acts.<sup>1</sup> We disagree. Evidentiary rulings are within the discretion of the trial court, and are reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Admissibility rulings should only be reversed where there is a clear abuse of discretion. *Id.* An abuse of discretion occurs when there is no justification for the trial court's ruling in light of the facts presented. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MRE 404(b) is not implicated unless the defendant's character can be inferred from the act and the conduct in question can be inferred from the defendant's character. *People v VanderVliet*, 444

Mich 52, 62-64; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). “Therefore, if the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated.” *Id.* at 64. Evidence is relevant if it has 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; *People v Brooks*, 453 Mich 511, 517; 557 NW2d 106 (1996); *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999).

Contrary to defendant’s assertion, we conclude that the prosecution’s questions concerning defendant’s betting did not elicit bad act evidence, but relevant evidence under MRE 401. Throughout his testimony, defendant attempted to portray Carrillo as the antagonist in the relationship. Defendant testified that Carrillo started the argument that led to the assault on January 9, 1997. Defendant stated that he was afraid of Carrillo due to prior instances of her abusing him. Defendant testified that Carrillo had attacked him with a dagger, called the neighbors to beat him up, “sucker punched” him, and hit him with a gun. Defendant stated that he picked up the hammer in order to defend himself if Carrillo attacked him. Defendant denied that he intended to strike Carrillo with the hammer. In his efforts to portray Carrillo as the aggressor, defendant made his gambling relevant. While defendant’s character may have been inferred from his gambling, defendant’s assault of Carrillo and the child could have been inferred from any character inferences that arose from the testimony of his gambling. Therefore, MRE 404(b) was not implicated by the testimony that defendant gambled.

Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). We conclude that the probative value of defendant’s testimony regarding his betting on horses was not substantially outweighed by any of the considerations put forth in MRE 403. While the testimony was potentially damaging, this does not mean that it was unfairly prejudicial. *Mills, supra* at 74-75.

Defendant also argues that the trial court erred in admitting evidence that defendant threatened Carrillo after the court told defendant not to have contact with her. Again, we disagree.

MRE 404(b) prohibits the use of other acts evidence to establish character in order to prove conformity with that character. MRE 404(b); *Lukity, supra*. However, character evidence is admissible to prove motive, intent, lack of mistake, identity, and a common scheme or plan. *Id.* In ruling on the admissibility of other act evidence under MRE 404(b), the trial court must determine:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Starr, supra*, quoting *VanderVliet, supra*.]

The prosecution bears the initial burden of establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

We conclude that the trial court did not abuse its discretion when it allowed the testimony regarding defendant's threatening of Carrillo. The prosecution explained to the trial court that the question concerning the no contact order was relevant to defendant's state of mind. Due to the crimes that were charged, defendant's intent was a key issue in the trial. Defendant testified that Carrillo instigated the argument that led to the assault on January 9, 1997. Defendant stated that he had the hammer for self-defense purposes only, and that his intention was to be peaceful. The act of threatening a witness can demonstrate the defendant's consciousness of guilt, and is generally admissible. *People v Scholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). In light of the facts presented, the trial court's ruling was justified.

Even if we were to determine that the trial court abused its discretion in admitting the evidence of defendant's threats, the erroneous admission of evidence should not be reversed because any such error would have been harmless. MCR 2.613(A); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Whether an error was harmless is determined by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without it. *Lukity, supra*. We find that it would not.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Donald E. Holbrook, Jr.  
/s/ Joseph B. Sullivan

<sup>1</sup> Defendant does not specify on appeal which evidentiary rulings were an abuse of discretion. Therefore, we assume that defendant is referring to the errors mentioned in Issue I of his brief on appeal. Since defendant's question presented states that the evidence was admitted over defense counsel's objections, the bad acts evidence that we review will be limited to those errors contained in Issue I that were objected to during trial.