STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRES GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
December 15, 2000

No. 216177
Saginaw Circuit Court
LC No. 98-015238-FH

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit criminal sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). The trial court sentenced him as a second habitual offender, MCL 769.10; MSA 28.1082, to three to ten years' imprisonment. Defendant appeals as of right. We affirm.

Defendant and the complainant were acquaintances before the incident which led to the charge. At trial, the complainant testified that defendant appeared unannounced at her home late one night. After she allowed him inside to make a telephone call, defendant attempted to sexually assault her. She was able to fight him off, however, and with the help of her cousin threw defendant out of the home. Defendant acknowledged his presence at the complainant's home on the night of the assault, but testified that what began as a consensual sexual encounter ended when he mentioned that he was in the process of reconciling with his current girlfriend. Defendant denied assaulting the complainant and testified that any physical contact occurred only as he sought to fend off the complainant's subsequent attack and leave the home.

Defendant first challenges the court's decisions, during the prosecution's case-in-chief, to admit certain evidence and testimony over defense objections. We review questions regarding the admission of evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Defendant contends that the trial court abused its discretion in admitting an anonymous note found in the complainant's mailbox after the alleged assault, and in allowing the

complainant to testify that she received several anonymous telephone hang-up calls after the incident. Defendant initially argues that this evidence was irrelevant, then alternately contends that even if minimally relevant, it was substantially more prejudicial than probative. He additionally claims that the challenged evidence lacked authentication and constituted hearsay. We disagree on all grounds.

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. Even if relevant, however, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. Defendant argues that the evidence was irrelevant and prejudicial because there was no proof that he made the contacts and because it would be unreasonable to infer that these contacts, which could be innocently explained, constituted threats to harm the complainant. However, such arguments presume, as defendant does, that the prosecution sought to establish defendant's guilt of the assault by suggesting to the jury that defendant harassed the complainant following the assault. The prosecution, meanwhile, argues that the evidence was introduced for the purpose of showing the complainant's reaction to the contacts. The complainant testified that she was frightened by the note and at minimum concerned by the repeated hang-up telephone calls. The complainant's reaction, the prosecution contends, suggests that contrary to the defense theory the incident was not consensual.

We find that the evidence was both material to and probative of the theory that the incident was not consensual. See *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Furthermore, because this case essentially presented a credibility contest between the complainant and defendant, we find that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. While plausible that the jury could have inferred from the evidence that after the incident defendant harassed and threatened the complainant, an inference which standing alone would be insufficient to support conviction, defendant's argument that he was likely convicted on such basis ignores the fact that the complainant's asserted emotional reaction was highly probative of her claim that the incident shook her up and was unconsensual.

With regard to defendant's remaining challenges to these evidentiary rulings, we first note that given the approved basis for admission, the question of authentication need not be addressed. Though on cross-examination defense counsel did elicit from the complainant that she could not identify defendant as either the caller or the author of the note, the prosecution never alleged that defendant was the source of the contacts. The identity of the source of the contacts is of negligible impact to the theory that the complainant's reaction supports the non-consensual nature of the incident. As to the question of hearsay, because defendant never challenged the evidence on this basis during trial the issue is unpreserved. MRE 103(a)(1). Our review accordingly confined to plain error, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), we find that any error did not affect defendant's substantial rights. *Id.*

Defendant next argues that the trial court erred in admitting rebuttal testimony of the complainant's mother to contest defendant's claim that he telephoned her on the night in question and asked her to give the complainant his telephone number. Rebuttal evidence must relate to a

substantive rather than a collateral matter. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). Proper rebuttal testimony contradicts the defendant's testimony and tends to directly disprove a witness' exact testimony. *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995). Here, the evidence was admitted to refute defendant's assertion that he telephoned the complainant's mother in the hours before the attempted assault occurred. This matter was material because it went to defendant's claim that his appearance at the complainant's home was pursuant to her invitation. Because defendant failed to object to the testimony this issue is unpreserved, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and we again review only for plain error. *Carines, supra*. Concluding that the testimony involved a matter that was not collateral and was properly admitted we find no error.

Finally, defendant argues that a statement made during closing argument constitutes prosecutorial misconduct. Defendant contends that the prosecutor improperly shifted the burden of proof when she commented on defendant's brother's testimony regarding why, given that he knew his brother faced this charge, he had not previously come to the police with the exculpatory information to which he testified. Once again unpreserved by objection, we review this issue only for plain error. *Carines, supra.*

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The interest or bias of a witness is never irrelevant. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), disapproved on other grounds in *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995). Here, the prosecutor's argument drew a legitimate inference from the testimony concerning the interest or bias of defendant's brother. We find no error affecting substantial rights. *Carines, supra.*

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder