STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2001
v	No. 219683 Macomb Circuit Court
DAVID ZEF CUKAJ, Defendant-Appellant.	LC No. 98-001872-FH

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of extortion, MCL 750.213, and found not guilty of a second extortion count.[1] He was sentenced to a term of five to twenty years' imprisonment. He appeals as of right raising a number of issues. We affirm in all respects.

I

Defendant first argues that the trial court erred by allowing three police officers to testify about statements made by the victim concerning threats allegedly made by defendant. We disagree. The decision to admit or exclude evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

The challenged testimony was admitted under the excited utterance exception to the hearsay rule, MRE 803(2). Under this exception, a hearsay statement is admissible if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Two general requirements must be shown: (1) that there was some startling event, and (2) that the statement at issue resulted from the startling event while the declarant was still under the excitement caused by the event. *People v Larry Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

[1] The judgment of sentence incorrectly states that defendant was convicted of both counts of extortion. The trial court shall prepare an amended judgment of sentence correcting this clerical error.

In the instant case, the statements related to a startling event, including threats to kill the victim and his family if the victim did not pay defendant $15,000. The testimony of each officer sufficiently established that the victim made the statements while still under the stress of the startling events. Upon review of the record, we find the trial court did not abuse its discretion by admitting the statements under MRE 803(2).

II

Next, defendant argues that the evidence was insufficient to support his conviction for extortion. We disagree. In reviewing a sufficiency issue, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

The crime of extortion, MCL 750.213, is comprised of the following elements:

> 1) a communication, 2) threatening accusation of any crime or offense or any injury to the person or property or mother, father, husband, wife, or child of another, 3) with intent thereby to extort money or pecuniary advantage as to compel the person so threatened to do or refrain from doing an act against his will. [*People v Krist*, 97 Mich App 669, 675; 296 NW2d 139 (1980).]

The victim testified that defendant threatened to kill him and his family if he did not pay defendant $15,000 or $50,000. Viewed most favorably to the prosecution, this testimony alone was sufficient to establish the crime of extortion. Contrary to what defendant argues, the absence of corroborating evidence does not render the evidence insufficient to support a conviction. Rather, the presence or absence of corroborating evidence is relevant only to the weight and strength of the prosecution's case, not the sufficiency of the evidence.

Defendant also argues that the jury's verdict was against the great weight of the evidence. Because defendant did not raise this issue before the trial court in a motion for a new trial,[2] this issue is not properly preserved and we decline to address it. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997); MCR 2.611(A)(1)(e).

III

Defendant further argues that he is entitled to a new trial because of juror misconduct. One of the jurors submitted an affidavit indicating that some of the other jurors informed him that they had observed the victims crying through an open door to a conference room. The juror indicated that, although he initially voted to find defendant not guilty, he subsequently changed his decision because the other jurors persuaded that the victims would not have been crying unless defendant was guilty. The trial court denied defendant's motion for a new trial based on

[2] Although defendant filed a motion to remand with this Court, the motion was denied for failure to persuade that a remand was needed.

this issue. We review the trial court's decision for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

During deliberations, jurors may consider only the evidence presented in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). In order to establish that the jury was influenced by extraneous facts not introduced into evidence, a defendant must meet a two prong test. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these influences "created a real and substantial possibility that they could have affected the jury's verdict" and "demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict". *Id.* at 89 (citations omitted).

According the first prong of the afore-referenced test, because the observation of the victims crying in the conference room occurred outside of the adversarial process, it may properly be characterized as an extrinsic influence. However, defendant was still required to show that this extraneous influence was "substantially related to a material aspect of the case," and it created a real and substantial possibility that the jury's verdict was affected. *Id*. at 89. The record indicates that the jury had already observed the victims crying during trial, while they were in court and testifying. Thus, the information to which some of the jurors were exposed outside of the courtroom was cumulative of information to which they were exposed during trial. Under these circumstances, the extraneous information cannot be considered to have created a real and substantial possibility that the jury's verdict would be affected. Thus, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

IV

Defendant next argues that the trial court erred when it refused to permit defense counsel to ask the victim whether he had ever known defendant to carry a gun, apparently to show that the victim had no reason to fear defendant. We do not dispute defendant's claim that the questioning was relevant. However, the record indicates that the trial court excluded the challenged testimony because it would open the door to allowing the prosecutor to bring out other facts explaining why the victim may have feared defendant; specifically, that defendant had raped and beaten the victim's sister. Before trial, the parties stipulated that this information would not be introduced, unless defendant opened the door to its admission. In arguing this issue on appeal, defendant has neglected to address the basis for the trial court's ruling to exclude the testimony. Accordingly, he has not established that the court erred in its ruling. Further, defendant has not shown that the court's ruling deprived him of his constitutional right of confrontation. US Const Am VI; Const 1963, art 1, § 20. Defendant did not have the unlimited right to cross-examine witnesses on any subject. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The court made a limited ruling and defendant was otherwise free to question the witness about his state of mind and whether he feared defendant. We find no error requiring reversal with respect to this issue.

V

Defendant next argues that the prosecutor failed to comply with MCL 767.40a(3) by not filing his amended witness list at least thirty days before trial. The prosecutor filed an amended

witness list when the case was scheduled for trial in November of 1998. That trial date was subsequently adjourned and defendant was not tried until over one month later. Because it is undisputed that defendant received the prosecutor's amended witness list at least thirty days before the trial commenced, we find no merit to defendant's claim that the prosecutor violated MCL 767.40a(3).

VI

Defendant also asserts that he is entitled to a new trial because the trial court exclusively conducted the voir dire. Issues involving jury voir dire are unpreserved for appellate review where the defendant fails to object, expresses satisfaction with the jury selected, and fails to demonstrate prejudice. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995).

In the instant case, defendant did not object to voir dire being conducted by the trial court. He expressed satisfaction with the jury selected. Finally, defendant fails to demonstrate that he was prejudiced by the court's decision to conduct voir dire. In particular, defendant has not shown that the court failed to ask probing questions which would deprive him of the ability to intelligently make a challenge for cause or exercise his peremptory challenges. Accordingly, appellate relief is not warranted.

VII

Next, defendant argues that the trial court erred by allowing the officer in charge to opine that defendant knew about the warrant for his arrest and was trying to avoid arrest. Because defendant did not object to this testimony at trial, appellate relief is foreclosed absent plain error affecting defendant's substantial rights. *Carines, supra*. Under MRE 701, a witness is permitted to offer opinion testimony that is rationally based on the witness' own perceptions if helpful to a clear understanding of the testimony or a fact in issue. Here, the officer testified regarding the factual reasons leading him to conclude that defendant was aware of the warrant and was evading arrest. Defendant has not shown that the officer in charge's testimony fell outside the parameters of MRE 701. Because the officer's opinion was based upon his perceptions of defendant's actions, consistent with MRE 701, defendant has not shown that the testimony constituted plain error.

VIII

Next, defendant argues that he is entitled to a new trial because of prosecutorial misconduct. Defendant contends that the prosecutor improperly elicited testimony that infringed on his right to remain silent, contrary to *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973). Because defendant did not object to the challenged testimony in the trial court, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Defendant's argument lacks merit because the questions posed by the prosecutor related to defendant's silence before he was arrested, and before he was advised of his *Miranda*[3] rights. Such questioning did not violate

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defendant's constitutional rights. *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992).

Defendant also claims that the prosecutor improperly questioned a witness about a tape recording made of defendant calling the witness. Defendant objected to the question on the basis of relevance, not prosecutorial misconduct. Accordingly, the issue is not properly preserved for appellate review. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996), and appellate relief is therefore precluded absent a showing of plain error affecting defendant's substantial rights. *Carines, supra*; *Schutte, supra*.

Prosecutorial misconduct cannot be based on good-faith efforts to admit evidence. *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court so long as that attempt does not actually prejudice the defendant. Absent a showing of bad faith by the prosecutor, this Court will not reverse simply because defense counsel was required to do his job and object. *Id*. at 328-329.

When defendant objected to the question, the court ruled that it was proper cross-examination. Defendant has not addressed the trial court's decision to admit the evidence. Nonetheless, even if the prosecutor's questioning was improper, defendant has not shown that the prosecutor engaged in a bad-faith attempt to introduce evidence he knew was improper. *Missouri, supra*. In any event, the questioning did not prejudice defendant by affecting the outcome of trial, considering that the jury was never appraised of the contents of any alleged tape-recording. *Carines, supra*. Also, when the witness later testified, he was only allowed to tell the jury about threats that defendant made towards the victim, not the witness himself.

IX

Defendant next argues that a new trial is required because the trial court failed to provide a supplemental instruction as requested by the jury. The record indicates that, before the court had an opportunity to give the supplemental instruction, the jury announced that it reached a verdict. The court never informed the jury that it would not provide the supplemental instruction, nor did the court unreasonably delay in acting on the jury's request. Under the circumstances, the record supports the conclusion that the jury determined that it no longer needed the supplemental instruction. Therefore, we conclude that reversal is not required. Although defendant also contends that the court's proposed supplemental instruction was inaccurate, the instruction was never given to the jury. Accordingly, any error associated with the instruction does not entitle defendant to appellate relief.

X

Defendant next argues that trial counsel was ineffective. Because defendant did not raise the issue of ineffective assistance of counsel before the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). To set forth a viable claim for the ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that he was so prejudiced by the representation that he was denied his right

to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). 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). To establish prejudice, defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Limiting our review to the record, we conclude that defendant has not met his burden of showing that defense counsel was ineffective. First, he has not established that his trial attorney failed to effectively cross-examine the victim's wife. The victim's wife testified that she heard defendant make threats in English only. Thus, regardless of whether she was unable to understand Albanian, her testimony was not substantially affected. Further, counsel was not ineffective for failing to call an expert witness in either French or Albanian.

Defendant also argues that counsel was ineffective for failing to call either his brother or father as a witness. The decision of what witnesses to call is generally considered a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Because the record does not disclose whether counsel intentionally chose not to call these witnesses as matters of strategy, or what the substance of the witnesses testimony would be, defendant has not sustained his burden establishing that defense counsel was ineffective.

Defendant requests that this Court remand for an evidentiary hearing on the issue of ineffective assistance of counsel. Because a prior panel previously denied defendant's motion to remand on this issue, and because defendant has not offered any additional information, we conclude that a remand is not warranted.

IX

Next, defendant argues that the trial court erred by allowing the prosecutor to call the victim's brother as a rebuttal witness. Rebuttal evidence is limited to relevant and material evidence. To be admissible on rebuttal, the evidence must address an issue properly raised in the case. *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995). Proper rebuttal evidence includes testimony that contradicts the testimony of the other party's witness if the evidence tends to disprove the prior witness' testimony. *Id*. at 505-506. Evidence may not be introduced on rebuttal unless it relates to a substantive matter. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997).

Defendant objected to the victim's brother being called as a rebuttal witness to testify about any threats defendant may have made against the victim's brother. The trial court agreed that the witness would only be permitted to testify about threats directed towards the victim. The witness testified consistent with the trial court's ruling. Accordingly, we conclude that defendant has not shown that error occurred. Moreover, regarding the witness' testimony about threats directed towards the victim that were made to him by defendant, the evidence was properly received as rebuttal evidence considering defendant's denial on direct examination that he never threatened the victim.

Furthermore, defendant has not shown that the rebuttal witness should not have been allowed to testify because defense counsel was not afforded prior notice of the witness. Because the prosecutor did not know ahead of time the substance of defendant's trial testimony, the prosecutor could only provide limited notice of its rebuttal witnesses. On these facts, the prosecutor had good cause for the late endorsement of this witness. *People v Kulick*, 209 Mich App 258, 265; 530 NW2d 163 (1995), remanded for reconsideration on other grounds 449 Mich 851 (1995).

XII

Defendant argues that the trial court erred by permitting the officer in charge to address the court at the time of sentencing because the officer in charge is not a "victim" for purposes of the Crime Victim's Rights Act, MCL 780.751, *et seq*. *People v Williams*, 244 Mich App 249, 253-254; 625 NW2d 132 (2001); MCL 780.765. At sentencing, a trial court has broad discretion concerning the sources and types of information it may consider when imposing a sentence. This includes relevant information about the defendant's life and characteristics. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). In *Albert, supra*, this Court held that the trial court did not abuse its discretion when it permitted a lawyer who represented one of the victims in a civil suit to testify at the defendant's sentencing hearing.

Similarly, in this case, we conclude that it was within the trial court's discretion to permit the officer in charge to address the court at sentencing. Merely because the officer was not a victim for purposes of the Crime Victim's Rights Act, does not mean that he could not address the court at sentencing, within the trial court's sound discretion. Thus, defendant has not established error as a matter of law.

XIII

Finally, defendant argues that his sentence of five to twenty years' imprisonment violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Considering the court's remarks about the severe impact this crime had on the victim and his family, we cannot say that defendant's minimum five years' imprisonment sentence is disproportionate.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Judge Harold Hood
/s/ Brian K. Zahra