

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WESLEY D. SANDERS,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2002

No. 223013

Wayne Circuit Court

Criminal Division

LC No. 99-002051

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of arson, MCL 750.72, aggravated stalking, MCL 750.411i, and placing explosives with the intent to injure or cause property damage, MCL 750.209(1)(b). He was sentenced as a fourth habitual offender, MCL 769.12, to twenty to fifty years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that the trial court improperly permitted the prosecutor to make certain remarks during her closing and rebuttal arguments. We disagree. The trial court has considerable discretion in ruling on the relevance and the materiality of argument coming before it and this Court will not reverse absent an abuse of that discretion. *People v Johnson*, 393 Mich 488, 499; 227 NW2d 523 (1975).

Defendant argues that the court erroneously overruled his objection to the prosecutor's characterization of him as an "evil man" during closing argument. Defendant cited MRE 404(b) as the basis for his objection at trial. However, MRE 404(b) is an evidentiary rule that prohibits evidence of other crimes, wrongs, or acts in order to prove the character of a person in order to show action in conformity therewith. The rule has no applicability to the prosecutor's remarks during closing argument. A prosecutor has wide latitude in arguing the evidence and reasonable inferences arising therefrom during closing argument, and is not required to confine her argument to the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Where the evidence suggested that defendant firebombed a house that was occupied by numerous people, including several children, it was not improper to refer to defendant as "evil."

Defendant also argues that the trial court erroneously overruled his objection to the prosecutor's statement suggesting that a defense investigator had helped a key defense witness remember the date that defendant was allegedly with him. To the extent the prosecutor improperly challenged defense counsel's veracity, see *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984), we are satisfied that this insinuation did not affect the outcome of the trial. Therefore, reversal is not required. *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999).

## II

Defendant contends that prosecutorial misconduct deprived him of a fair trial. With regard to those instances in which defendant did not preserve the issue with an appropriate objection at trial, we will review the claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). With regard to those claims that are preserved, we must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context in order to determine whether defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

### A.

As previously discussed, it was not improper for the prosecutor to refer to defendant as an "evil man" in her closing argument. The remark was a proper comment on the evidence. *Aldrich, supra*.

### B.

Defendant argues that the prosecutor improperly invited him to label prosecution witnesses as liars. Defendant did not preserve this issue with an appropriate objection at trial. In *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), our Supreme Court held that it is improper for a witness to comment on the credibility of another witness, because matters of credibility are to be determined by the trier of fact. Here, defendant was not asked to comment on the credibility of the two prosecution witnesses. Rather, he was asked if he knew why the witnesses would lie about claiming that defendant made threatening telephone calls. Considered in context, defendant has not shown that the prosecutor's questions constituted plain error.

### C.

Defendant next contends that the prosecutor repeatedly vouched for her case and the credibility of her witnesses during her closing argument. Again, defendant did not preserve this issue with an appropriate objection at trial. Although a prosecutor is prohibited from vouching for a witness' credibility by suggesting that the government has some special knowledge that the witness is testifying truthfully, *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), the record here reveals that the prosecutor limited her argument to the facts and evidence presented at trial, which was proper. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Jackson*, 125 Mich App 251, 257; 335 NW2d 673 (1983). No plain error has been shown.

D.

Defendant next argues that the prosecutor improperly appealed to the jury to sympathize with the complainants. *Wise, supra* at 104. Even if improper, the brief, isolated remark could not be considered so prejudicial that it affected defendant's substantial rights. Thus, this unpreserved issue does not warrant relief.

E.

Defendant renews his contention that the prosecutor improperly disparaged the defense by suggesting that a defense investigator helped a defense alibi witness remember the date that defendant was with him. As previously discussed, we are satisfied that this insinuation did not affect the outcome of the trial. Thus, reversal is not required. *Lukity, supra*.

F.

Finally, relying on *Brecht v Abrahamson*, 507 US 619, 638 n 9; 113 S Ct 1710; 123 L Ed 2d 353 (1993), defendant contends that the prosecutorial misconduct in this case was so egregious and so infected the integrity of the judicial process that appellate relief is required even absent a showing of prejudice. In light of the foregoing, we find no merit to defendant's claim that there was such a pattern of misconduct that obviates consideration of prejudice.

### III

Defendant argues that the trial court abused its discretion by excluding evidence suggesting that others had a motive to harm the complainant. We disagree. The decision whether to admit evidence is left to the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

Here, the proffered evidence all involved incidents that were remote in time and occurred at a different address. There was no offer of proof showing that the other perpetrators knew that Ms. Hamilton had moved to the Chenlot address and, more significantly, defendant failed to offer any substantiating evidence linking the other alleged perpetrators to the charged offense. See *People v Holliday*, 144 Mich App 560, 573; 376 NW2d 154 (1985). Accordingly, the trial court did not abuse its discretion in excluding the evidence.

### IV

Defendant challenges several aspects of the trial court's instructions on reasonable doubt. Because defendant did not object to the court's instructions at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*. A reasonable doubt instruction, "when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Viewed in their entirety, we are satisfied that the trial court's reasonable doubt instructions adequately informed the jurors of the prosecution's burden and what constituted a reasonable

doubt, ensuring that there was no reasonable likelihood that the jurors applied the instructions in a manner that violated the constitution. *Id.*; see also *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994).

## V

Defendant argues that the evidence was insufficient to support his conviction for aggravated stalking. Challenges to the sufficiency of the evidence at trial are reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Defendant contends that there was no evidence that he made a credible threat. We disagree. The evidence indicated that defendant left a series of telephone messages which, viewed most favorably to the prosecution, could be construed as a threat to kill or inflict physical injury, and which were made in a manner or context that would cause the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual. MCL 750.411i(1)(b). Thus, we reject defendant's claim that there was insufficient evidence of a credible threat to sustain his conviction for aggravated stalking.

## VI

Defendant argues that he was deprived of the effective assistance of counsel at trial. To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 889 (2001). In so doing, defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 600. Second, defendant must show that the deficient performance prejudiced his defense. *Id.* To demonstrate prejudice, defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Defendant raises four claims in support of his argument that he was deprived of the effective assistance of counsel.

### A. Failure to impeach a prosecution witness with his prior inconsistent statements

Defendant argues that counsel should have impeached prosecution witness Shantoine Lawrence with inconsistent statements that he made. According to a police statement, the witness said that he saw defendant standing by the side of the house and then drive off in his car. At the preliminary examination, however, the witness said that he saw defendant in the front of the house, but did not see him leave. At trial, the witness testified that he saw defendant driving a car after the fire-bombing.

It is apparent that defendant was not prejudiced by counsel's failure to point out the inconsistencies, considering that they all involved relatively minor points, and that the witness' testimony was consistent with regard to the critical fact that he saw defendant in the vicinity of the offense.

#### B. Failure to object to Exhibit I

At trial, prosecution witness Moneeka Hamilton testified about the various threatening messages that defendant left on her voicemail. She took notes of the various messages, which were admitted into evidence as an exhibit. Although we agree that the exhibit itself was not admissible under MRE 803(5), we discern no prejudice to defendant from counsel's failure to object on this basis because the substance of the notes was still properly before the jury through her testimony.

#### C. Failure to object to erroneous instructions

Defendant argues that trial counsel was ineffective for not objecting to the court's reasonable doubt instructions. In light of our previous conclusion that the instructions that were provided adequately conveyed the concept of reasonable doubt to the jury, we find that trial counsel was not ineffective for failing to object. Counsel was not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

#### D. Failure to object to prosecutorial misconduct

Defendant contends that trial counsel erred by failing to object to the various instances of prosecutorial misconduct discussed in part II of this opinion. Consistent with our resolution of the claims discussed in part II, we conclude that defendant has not established that the result of the trial would have been different had counsel objected.

Accordingly, defendant has not sustained his claim of ineffective assistance of counsel.

### VII

Defendant contends that the cumulative effect of multiple errors deprived him of a fair trial. Although the cumulative effect of a number of minor errors may in some cases amount to error requiring reversal, we conclude here that defendant was not denied a fair trial because of the cumulative error. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

### VIII

Finally, defendant argues that the aggravated stalking statute is unconstitutional. We disagree. This Court has previously held that the statute is constitutional. *People v White*, 212 Mich App 298, 308-309; 536 NW2d 876 (1995); *People v Ballantyne*, 212 Mich App 628, 629; 538 NW2d 106 (1995). Further, defendant's reliance on *Staley v Jones*, 108 F Supp 2d 777 (WD

Mich, 2000), is misplaced because that decision has been reversed. *Staley v Jones*, 239 F3d 769, 793 (CA 6, 2001).

Affirmed.

/s/ Michael J. Talbot  
/s/ Michael R. Smolenski  
/s/ Kurtis T. Wilder