

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK LYDELL WELLS,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 230375

Kent Circuit Court

LC No. 99-010264-FC

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of one count of assault with intent to commit murder, MCL 750.83, and one count of unlawful driving away of an automobile, MCL 750.413. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent sentences of thirty to ninety years' and four to twenty years' imprisonment, respectively. Defendant appeals as of right. We affirm.

The prosecution claimed that defendant repeatedly stabbed his former girlfriend, causing injuries to her neck, chin, and hands. The prosecution also claimed that, after stabbing the victim, defendant drove away in her car without authorization. The defense contended that the victim was the aggressor and that defendant was acting in self-defense during the struggle that caused the victim's injuries. The defense also asserted that defendant was impliedly authorized to drive the victim's automobile. The jury found defendant guilty as charged.

On appeal, defendant contends that he was deprived of his constitutional right to effective assistance of counsel based on several purported errors. Generally, a successful claim of ineffective assistance of counsel requires a defendant to show that defense counsel's "performance fell below an objective standard of reasonableness under prevailing professional norms." *People v Rodgers*, 248 Mich App 702, 714; ___ NW2d ___ (2001). In addition, a defendant "must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *Id.* There is a "strong presumption" that counsel's actions "constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Because defendant did not request a new trial or an evidentiary hearing on this issue below, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant contends that it was not sound strategy for his attorney to advise defendant, and ultimately decide, not to request instructions on any lesser-included offenses. However, defense counsel presented a theory of self-defense throughout the trial. This theory was entirely consistent with defendant's post-arrest statements and testimony. Because defense counsel pursued a jury verdict that aligned with the evidence presented directly by his client, we are not persuaded that defense counsel's performance deviated from an objective standard of reasonableness. *Rodgers, supra* at 714. Consequently, we reject defendant's contention of error.¹

Defendant next argues that evidence of both defendant striking the victim's daughter and the restraining order against defendant that resulted from the incident should not have been admitted at trial because both pieces of evidence prejudiced defendant by showing him to have a criminal propensity. Where, as here, there is no objection to the introduction of evidence, the issue is forfeited for appellate review. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Thus, defendant is not entitled to relief unless he can show a plain error that affected his substantial rights. *Id.*

To be admissible under MRE 404(b), "bad acts" evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Here, the evidence was relevant to provide a context for why defendant and the victim met on the night of the assault. Indeed, although the victim and defendant had a child together and had bought a house together, defendant was no longer living with her because of the restraining order; therefore, they had to arrange to meet to sign loan documents for improvements to the house and to exchange child support money. The evidence may also have been relevant to establish defendant's motive for the assault. Thus, the evidence was not admitted solely for the improper purpose of demonstrating defendant's criminal propensity. See *id.* at 74.

Further, we are not persuaded that the probative value of the evidence was substantially outweighed by its potential for unfair prejudice. Although the evidence may have suggested that defendant had a violent character, the victim's willingness to violate the restraining order and meet him alone at his house, even though she was pregnant with another man's child, suggested that she was not afraid of him. Moreover, we note that the underlying "bad acts" in this case did not involve an act of violence against the victim—further reducing the potential for unfair prejudice. Thus, it does not plainly appear that the evidence was inadmissible pursuant to MRE 404(b). See *VanderVliet, supra* at 74-75; *Carines, supra* at 763-764. Consequently, defendant may not avoid forfeiture of this issue.² *Id.*

¹ Moreover, we note that the record suggests that defense counsel consulted with defendant before declining to request an instruction on lesser-included offenses, and that defendant indicated his satisfaction with this decision on the record.

² Defendant also contends that he was not provided notice that the prosecutor intended to introduce evidence of his prior bad acts. However, defendant does not suggest how the prosecutor's failure to provide notice impacted the outcome of the proceedings. See *People v*
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Defendant also argues that he was denied effective assistance of counsel because his attorney failed to object to the introduction of the aforementioned evidence. Specifically, defendant asserts that defense counsel unreasonably failed to prevent the introduction of the evidence either before trial, when the prosecutor indicated that the evidence would be introduced pursuant to MRE 404(b)(2), or during trial. Again, however, it is not plainly apparent that the evidence was inadmissible. Because trial counsel is not ineffective for failing to advocate a meritless position, we decline to conclude that defendant was deprived of his constitutional right to effective assistance of counsel. *Snider, supra* at 425.

Defendant also contends that the prosecutor improperly argued personal opinions about the credibility of defendant and the victim in her closing statement. Generally, we review “claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Where the prosecutorial misconduct issue is preserved, we evaluate “the challenged conduct in context to determine if the defendant was denied a fair and impartial trial.” *Id.* However, “[w]here a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error.” *Id.* “[T]o avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings.” *Id.*; See also *Carines, supra* at 763-764.

When examining the prosecutor’s closing statement as a whole, it appears that the prosecutor’s closing argument was based on the evidence, as well as reasonable inferences arising from the evidence that supported the prosecutor’s case theory. A prosecutor may argue the evidence and make reasonable inferences in order to support his or her theory of the case. *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995). Accordingly, we find no error.

Defendant also argues that the prosecutor committed misconduct by introducing the victim’s prior consistent statements to bolster her credibility. It does appear that the prosecutor violated MRE 801(d)(1) by introducing the victim’s prior consistent statements. However, we are not persuaded that the error impacted the outcome of the proceeding. *Aldrich, supra* at 110. Although there was a credibility contest as to whether defendant or the victim was the aggressor, the victim’s testimony was primarily bolstered by the trauma surgeon’s testimony that her wounds were consistent with self-defense. In contrast, defendant received only minor wounds, belying his contention that he was attacked by the victim. In fact, when compared to the improperly admitted evidence, these facts were far more probative as to which witness testified truthfully. Accordingly, we are not persuaded that the admission of the prior consistent

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Hawkins, 245 Mich App 439, 455-456; 628 NW2d 105 (2001). Instead, the gravamen of defendant’s argument is that the lack of notice led to the admission of inadmissible evidence. Without any indication as to what effect the lack of notice had on defendant’s case, we are left only to consider whether the bad acts evidence was inadmissible. Thus, in this case, we believe that defendant’s issue regarding the prosecutor’s failure to provide notice is subsumed by the issue of the admissibility of the bad acts evidence.

statements was outcome determinative; consequently, defendant may not avoid forfeiture of his contention of prosecutorial misconduct.³

Affirmed.

/s/ Janet T. Neff

/s/ Donald S. Owens

³ Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel because of defense counsel's failure to prevent, object to, or cure the prejudice resulting from the prosecutor's misconduct. However, having already concluded that the one instance of prosecutorial misconduct was not outcome determinative, even if we assume that defense counsel's performance deviated from an objective standard of reasonableness, defendant's argument is without merit. See *Rodgers, supra* at 714.