

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER GILLEN,

Defendant-Appellant.

UNPUBLISHED
November 12, 2002

No. 232865
Kent Circuit Court
LC No. 00-008983-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant and the victim lived together. On July 28, 2000, the victim was found in her bedroom shot in the face. Defendant first told the police that the victim committed suicide. Later, defendant told the police that he accidentally shot her.

Defendant contends that evidence of defendant's prior conviction for reckless¹ discharge of a firearm was inadmissible under MRE 404(b). We disagree.

The prosecutor told the court that he understood the defense to be that the shooting was an accident or mistake. The prosecutor further stated that the evidence from the reckless discharge of a firearm conviction indicated that defendant was familiar with revolvers. The trial court stated, "[a]nd you want to admit this evidence solely for the purpose of showing that he had familiarity with guns." The prosecutor responded, "[i]n particular a revolver and in particular this heightened sense that person having gone through this recently would be under relative to this kind of a circumstance."

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

¹ The parties and the trial court used the terms "careless" and "reckless" interchangeably. Both terms are used in MCL 752.861. For this issue, whether the conviction involved careless or reckless discharge of a firearm is of no matter. Therefore, for consistency, we will use the term "reckless."

The trial court admitted the evidence of the reckless discharge of a firearm conviction. The trial court stated that if the defense in the case is that the shooting was an accident resulting from a lack of knowledge of firearms, this prior event goes directly to that. The trial court found that the evidence was more probative than prejudicial. The trial court also stated that it would instruct the jury that the evidence was being admitted to show that defendant was familiar with handguns.

MRE 404(b) states the following:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In order to be admissible under MRE 404(b), other acts evidence must satisfy four requirements: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) a determination must be made whether the danger of undue prejudice substantially outweighs the probative value; and (4) the trial court, upon request, may provide a limiting instruction. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). 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).

“The decision whether such evidence is admissible is within the trial court’s discretion and will only be reversed where there has been a clear abuse of discretion.” *Id.*, 383 (citation omitted). The court abuses its discretion “when the result is ‘so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.’” *People v Wilhite*, 240 Mich App 587, 595; 618 NW2d 386 (2000). Stated another way, “an abuse of discretion also exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.” *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The prosecutor offered the evidence for a proper purpose—absence of mistake. This evidence was relevant to the issue of whether defendant accidentally shot the victim. Finally, we cannot say that the probative value of the evidence was substantially outweighed by its prejudicial effect.

We cannot say that an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse or justification for this ruling. Therefore, we hold that the trial court did not abuse its discretion in admitting the evidence of the reckless discharge of a firearm conviction.

Next, defendant contends that trial counsel was ineffective. We disagree. Because there was no hearing, our review is limited to errors apparent on the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

“[T]o find that a defendant’s right to effective assistance of counsel was so undermined that it justified reversal of an otherwise valid conviction, a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant claims that defense counsel’s failure to obtain an independent firearms expert constitutes ineffective assistance of counsel. There is nothing in the record presented to indicate that any firearms expert would have testified favorably to defendant. Therefore, he has not shown a reasonable probability existed that, if defendant would have called an independent firearms expert, the outcome of the proceedings would have been different. *Avant, supra*, 235 Mich App 508.

Defendant also contends that the prosecutor committed misconduct in (1) seeking to arouse the jurors’ sympathy for the victim’s daughter; (2) arguing facts that were not in evidence; and (3) improperly referring to defendant’s parole status. We disagree.

Because defendant did not object to the prosecutor’s conduct, “review is foreclosed unless the prejudicial effect of the comment was so great that it could not have been cured by appropriate instruction or a failure to review the issue would result in a miscarriage of justice.” *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Furthermore, “to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

First, defendant argues that the prosecutor improperly sought to arouse the jurors’ sympathy for the victim’s daughter. In the prosecutor’s opening statement, he stated that on July 28, 2000, the victim’s daughter saw her mother for the last time, bleeding and fighting for her life.

This remark was a proper comment regarding the evidence the prosecutor intended to present. This comment was not a blatant appeal to the jurors’ sympathy and was not so inflammatory that defendant was prejudiced. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Therefore, this statement does not constitute misconduct requiring reversal.

Second, defendant asserts that the prosecutor improperly argued facts that were not in evidence. In his closing argument, the prosecutor stated that the victim was found face down. The prosecutor also stated that defendant wanted the victim to die.

“A prosecutor need not confine argument to the ‘blandest of all possible terms,’ but has wide latitude and may argue the evidence and all reasonable inferences from it.” *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001) (citation omitted). Viewing the

challenged remarks in context, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), we find that the prosecutor was arguing the evidence and the reasonable inferences from the evidence. Therefore, these statements do not constitute misconduct requiring reversal.

Last, defendant argues that the prosecutor made improper references to defendant's parole status, as well as defendant's improper conduct while on parole.

"A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than guilt or innocence of the accused." *Rice, supra*, 235 Mich App 438. However, "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *Noble, supra*, 238 Mich App 660 (citation omitted).

We find that defendant has not demonstrated bad faith on the part of the prosecutor. Further, we find that any prejudice resulting from the prosecutor's references to defendant's parole status and parole violations could have been cured by a timely objection and curative instruction. We conclude that a miscarriage of justice will not result from our failure to review this unpreserved issue.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof