

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARNOLD L. KIRKSEY,

Defendant-Appellant.

UNPUBLISHED

December 20, 2002

No. 233784

Wayne Circuit Court

LC No. 00-002545-01

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced, as a third habitual offender, MCL 769.11, to forty to sixty years in prison. We affirm.

The murder charge against defendant concerned a beating inflicted by defendant upon the victim that left her in a coma for over six years. Prior to the victim's death, defendant had been convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, for that beating. After she passed away from pneumonia, defendant was charged with second-degree murder. Defendant admitted to beating the victim into a coma, but argued that her death was not a result of his beating. Rather, defendant claimed that poor medical care was the cause of the victim's death.

Defendant first argues on appeal that the trial court erred in allowing the prosecution to introduce evidence of defendant's prior physical abuse of the victim. Defendant and the victim lived together as boyfriend and girlfriend and had a child together. The couple had a stormy relationship marked by numerous instances of fighting and physical abuse. Prior to trial, the prosecution, as required by MRE 404(b)(2), filed a notice of intent to use other acts evidence to show defendant's intent in beating the victim and to show that the beating was not an accident.

The prosecution offered testimony showing that defendant had beat the victim on at least two prior occasions, once at a concert and once in the parking lot of their apartment. At trial, defense counsel objected to some, but not all of this testimony. After conducting a hearing on the issue, the trial court allowed further introduction of defendant's prior bad acts finding that this evidence tended to show defendant's intent in hitting the victim and that the beating at issue was not an accident.

A trial court's decision whether to admit other acts evidence will be reversed only where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b) governs the introduction of other acts evidence.

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 where 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. [MRE 404(b)(1).]

Because defense counsel objected at times, but not every time, to the introduction of evidence detailing defendant's prior physical attacks, this issue will be reviewed for both preserved and unpreserved error. Unpreserved issues are reviewed for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). For preserved, non-constitutional errors the burden is on the defendant to affirmatively show that "the error asserted has 'resulted in a miscarriage of justice.'" *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), quoting MCL 769.26.

The Michigan Supreme Court has crafted a four-part standard to determine whether other acts evidence is admissible under MRE 404(b). "First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury." *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The first prong acts as a prohibition against the admission of other acts evidence only if that evidence is offered solely to show the "defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question" *Id.* at 63. The prosecution here offered the evidence of defendant's prior abuse of the victim in order to show defendant's intent (i.e., that the victim's injuries were not the result of an accident or mistake), not just defendant's inclination to wrongdoing.

The prosecution having shown that the evidence was offered for a proper purpose, it is still necessary to determine whether the evidence is relevant to the proffered purpose. Relevant evidence has two characteristics: materiality and probative force. *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). "To be 'material,' the evidence must be logically relevant to an issue or fact of consequence at trial. Any tendency to prove such a fact in issue constitutes sufficient probative value for purposes of relevancy." *Id.* at 497-498.

The evidence of defendant's history of violence against the victim has no relevance to the purposes for which the evidence was offered — intent and absence of mistake. With respect to intent, the prosecutor did not need to prove defendant's intent in hitting the victim because second-degree murder is a general intent, not a specific intent, crime. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). When the crime charged is a general intent crime, prior bad acts evidence is not relevant to prove a defendant's general intent. See *People v Sabin*, 463

Mich 43, 68-69; 614 NW2d 888 (2000). Moreover, defendant did not place his intent into dispute. Throughout the trial, defendant admitted to beating the victim into a coma and did not contend that he could avoid criminal responsibility for her ultimate death because he lacked the requisite intent.

The trial court similarly erred in admitting the prior acts evidence on the basis that it was relevant to show that defendant did not accidentally hit the victim. Accident was not at issue. Defendant repeatedly admitted beating the victim into a coma and at no point did defendant claim that he hit the victim by accident or mistake.

We thus conclude that it was error for the trial court to admit evidence of defendant's abusive history. However, it is still necessary to examine whether this error, where unpreserved, affected defendant's substantial rights or, to the extent the issue was properly preserved for appeal, whether it resulted in a miscarriage of justice.

With respect to any unpreserved error here, the establishment of error affecting substantial rights "requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines, supra* at 763. We find that defendant has failed to establish that the error in admitting other acts evidence was outcome determinative.

Defendant argues that, because prior bad acts evidence was improperly presented to the jury, the jury convicted him because they thought he was a "bad man." This argument fails for two reasons. First, both attorneys and the trial court repeatedly told the jury that they could only consider this evidence as it pertains to defendant's intent and lack of accident. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Second, the jury would have thought defendant was a bad man even if the evidence of defendant's violent history had not been admitted into evidence. Defendant admitted to beating the victim into a coma and then leaving her unconscious and vomiting on the couch for seven or eight hours without any medical attention. While certainly disturbing, the prior instances of abuse submitted by the prosecution rose to nowhere near the level of severity of the beating in the present case. In other words, defendant's own admissions would have caused the jury to consider him a bad man and his tainted image had little to do with the evidence of his violent history. Thus, defendant cannot show that the outcome of his trial would have been different had this evidence not been admitted.

With respect to preserved error here, in order to warrant a reversal of his conviction defendant must affirmatively show that the error of improperly admitting evidence "resulted in a miscarriage of justice." *Lukity, supra*. "[T]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* Considering the weight and strength of the untainted evidence, defendant cannot show that it is more probable than not that, had the other acts evidence not been admitted, the result of his trial would have been different.

First, it should be noted that even without the other acts evidence, overwhelming evidence was presented to warrant defendant's conviction of second-degree murder. To prove a defendant guilty of second-degree murder, the prosecution must show "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Goecke, supra* at 463-464. Of these elements, defendant contested only that his acts caused his victim's death.

Defendant admitted beating the victim into a coma, but claimed that poor medical care, not his beating, ultimately killed her.

There was conflicting testimony on this issue. Both doctors for the prosecution testified that pneumonia was “almost inevitable” for the victim because of her comatose state and that death from pneumonia was “a matter of time.” On the other hand, defendant’s medical witness testified that pneumonia was not an inevitable result for the victim and that the nursing home’s decision to reinsert a tracheostomy to assist the victim in breathing caused the victim to contract pneumonia. However, to assert a valid defense to murder based on inadequate medical care, it must be shown that “the medical treatment was grossly erroneous or grossly unskillful and the injury might not have caused death if [the victim] had not received such treatment.” CJI2d 16.16. Defendant’s medical expert made a very weak case that the decision to reinsert the tracheostomy caused the victim to contract pneumonia. Defendant’s expert was not able to state that the decision to reinsert the tracheostomy was “grossly erroneous” nor that this procedure was done in a “grossly unskilled” manner. Considering all the untainted evidence adduced at trial, it is clear that the jury agreed with the prosecution’s stronger case on the issue of causation. There is nothing to suggest that the jury found against defendant on the causation issue for totally illogical reasons, i.e., because they thought defendant was a bad man who had previously abused the victim.

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel failed to oppose the introduction of other acts evidence prior to trial and for failing to request a limiting instruction. Defendant has not fully preserved this issue for appeal. To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or request an evidentiary hearing on this issue at the trial court level. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant has done neither. Thus, this Court’s review of this issue is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was objectively unreasonable and that counsel’s defective performance prejudiced the defendant. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Prejudice sufficient to warrant reversal of a defendant’s conviction has been defined as prejudice that “affect[s] the outcome of the trial.” *People v Pickens*, 446 Mich 298, 332; 521 NW2d 797 (1994).

On appeal, defendant admits that defense counsel did, in fact, oppose the introduction of evidence detailing his prior abuse of the victim, but claims that defense counsel erred by not opposing the introduction of this evidence earlier. This opposition during trial was unsuccessful and nothing indicates that, had defense counsel objected prior to rather than during trial, defense counsel’s argument would have convinced the court to exclude the evidence. Second, even assuming *arguendo* that defense counsel was deficient in failing to submit written opposition to the other acts evidence prior to trial, defendant cannot establish that the outcome at trial would have been different. As discussed above, even if the other acts evidence was not admitted, defendant would have still been found guilty of second-degree murder. Finally, defendant’s claim that defense counsel erred by not requesting a limiting instruction is unpersuasive because the trial court did, in fact, give a detailed instruction to the jury on how it was to consider the

other acts evidence. Therefore, defendant has failed to prove that he was denied the effective assistance of counsel.

Defendant next argues that the trial court erred by not instructing the jury on assault with intent to do great bodily harm less than murder, MCL 750.84. However, an instruction on assault with intent to do great bodily harm less than murder would have been improper under *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). It is improper for a trial court to instruct the jury on an offense inferior to that charged in the indictment when the inferior offense is a cognate lesser offense of the crime charged in the indictment. *Id.* at 354-355. Assault with intent to do great bodily harm less than murder is a cognate lesser offense of second-degree murder. *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996).

Defendant next argues on appeal that he is entitled to resentencing because he was denied the right to complete the allocution required by MCR 6.425(D)(2)(c). Strict compliance with a defendant's right to allocution is required and the sentencing court must specifically ask a defendant if he has anything to say. *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999).

During his sentencing hearing, defendant was given the opportunity to inform the trial court of anything he deemed relevant. Defendant expressed his remorse and concluded by stating, "I'm very sorry for what I did. I know that's not enough, but that's all I can say." The trial court then began to announce the basis for its sentence. While the trial court was stating its reasons for its sentence on the record, defendant interjected: "If I may, your honor —." The trial court, however, continued without allowing defendant to speak.

After reviewing the record, it is clear that defendant was given the right to complete allocution as a matter of law. Defendant was given the chance to inform the trial court of all considerations he deemed relevant to sentencing and concluded his remarks with "that's all I can say." Thereafter, the trial court began to discuss the factors it considered in imposing sentence, such as defendant's history of violence and the severity of the beating. The right to allocution gives the convicted the right to inform the court of any circumstances he deems relevant to his sentence but does not give him the right to argue with the judge or to comment on the judge's remarks after his allocution is finished. *People v Westbrook*, 188 Mich App 615, 616-617; 470 NW2d 495 (1991). Because we conclude that defendant was not denied his right to complete allocution, we need not consider his claim that he is entitled to be resentenced by a different judge.

We affirm.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra