STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2002
V	No. 232095 Isabella Circuit Court
GARRICK GEORGE SMITH, Defendant-Appellant.	LC No. 00-009198-FC

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of third-degree criminal sexual conduct, MCL 750.520d(1)(b). He was sentenced as an habitual offender, second offense, MCL 769.10, to a term of eighty-eight months to fifteen years' imprisonment. Defendant appeals as of right, and we affirm.

This case arises from an incident between estranged spouses, in Isabella County, in June, 1999. Complainant testified that she married defendant in 1983, and separated from him in August 1998. The complainant described the marriage as turbulent, citing defendant's drinking, unemployment, and frequent resort to physical abuse and threats of further violence.

According to the complainant, during the early morning hours of June 20, 1999, defendant called her, said that he was stuck on the highway with a flat tire, and persuaded her to come for him. Shortly after she arrived, however, defendant's demeanor turned from friendly to belligerent. The complainant testified that defendant threatened her, seized control of her car, proceeded to a dead-end road, and then forcibly penetrated her.

Defendant was charged with kidnapping and first-degree criminal sexual conduct. An earlier trial resulted in a deadlocked jury, and a mistrial was declared. A second trial ended in a mistrial as a result of defendant's conduct in court in the presence of the jury. After a third trial, the jury found defendant not guilty of kidnapping, but guilty of the lesser offense of third-degree criminal sexual conduct. The trial court denied defendant's motion for a new trial, and this appeal followed.

I. Bad Acts Evidence

Defendant alleges that the trial court erred in allowing the complainant to testify about earlier acts of violence she had suffered from defendant. We disagree. The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996). In light of the stringency of the test for an abuse of discretion, a trial court's decision on a close evidentiary question cannot ordinarily be so characterized. *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982).

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character, or behavior consistent with those other wrongs, but provides that such uncharged conduct may be admissible for other purposes, including "proof of motive, . . . intent, . . . plan or system in doing an act . . . ." MRE 404(b)(2) in turn requires that a prosecutor wishing to introduce such evidence provide notice of that intent. See also *People v VanderVliet*, 444 Mich 52, 89; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Evidence of prior bad acts is admissible if it is offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by unfair prejudice. Additionally, upon request, the trial court may provide a limiting instruction. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.* at 386.

In proceedings attendant to defendant's first trial, the trial court disallowed evidence of defendant's past physical or mental abuse toward the complainant, but the court reversed itself on that point for purposes of retrial. The court cited *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996), where this Court stated that earlier violence is relevant in response to a defense of consent if the complainant testified that she submitted to sexual aggression out of fear of further violence. *Id.* at 675.

In this case, the complainant testified that when defendant initially became violent on the night in question, by threatening to harm her with a knife, she knew from experience that defendant always carried one, and she panicked based on her experience of years of abuse. She further reported trying to calm defendant with reassuring words, adding, "I've just over the years learned to try to be calm when he gets like this." Asked about surrendering the driver's seat upon defendant's demands, the complainant explained, "I was going to get over one way or the other," elaborating that experience suggested that defendant "would just put me over." Asked what she thought when defendant took control of the car, the complainant replied, "he was going to really beat me up bad and leave me, or possibly kill me." This testimony clearly established that the complainant's reactions to defendant's aggression at that time were based on her history of abuse at his hands.

Later, the complainant testified that during the course of defendant's forcible undressing of her, she put her arms around him and patted his back, but added that the latter gesture was neither an embrace nor a hug. On cross-examination the complainant admitted that she did not yell, scream, or try to flee at this time and earlier stated that she was "just trying to stay calm and not excite him any more than what he already was." The complainant thus indicated that she

chose to alleviate the situation by means other than by simply offering the utmost physical resistance. Because the defense maintained that what took place that night was a consensual tryst, the evidence of earlier acts of abuse served as a foundation for the theory of a sexual assault as the culmination of a long pattern of violence. This was a sufficient basis for establishing a proper purpose for presentation of the evidence of defendant's earlier abuse against the complainant. *Ullah, supra.*

This leaves the question whether the trial court erred in declining to exclude the evidence on the ground that its probative value was substantially outweighed by the danger of unfair prejudice. MRE 403; *Crawford*, *supra*. The potential for unfairness to the defendant in the presentation of evidence of prior bad acts is "not that it is irrelevant, but, to the contrary, that using bad acts evidence can 'weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *Crawford*, *supra* at 384, quoting *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644, 651-652; 136 L Ed 2d 574 (1997). However, considering that the defense was pursuing a theory of consent, and that some of the evidence could be taken to indicate that the complainant acquiesced in defendant's sexual advances on the occasion at issue, we conclude that the probative value of the evidence of earlier abuse was of great significance, and that the risk of unfair prejudice did not substantially outweigh it. *Crawford, supra*.

II. Expert Witness

The trial court qualified Bernice Lasher as an expert in the areas of domestic violence and sexual assaults. Defendant alleges that the court erred in admitting the substance of her testimony, and that the existing record of her testimony is deficient for purposes of preserving his appellate rights. We disagree.

A. Settled Statement of Facts

For benign reasons, Lasher's testimony was not recorded, and thus no transcript is available. In place of the missing transcript, the trial court assembled the parties and issued a summary of her testimony. See MCR 7.210(B)(2)(c).

A criminal defendant's right of appeal is guaranteed by our state constitution. Const 1963, art 1, § 20. The inability to obtain an accurate record of criminal proceedings may so impede that right that a new trial must be ordered. *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981).

Newly appointed appellate counsel expressed dissatisfaction with the settled statement of the record below, on the ground that it was not sufficiently detailed to allow her to discover and develop all possible appellate issues. However, defendant's trial attorney certified that the settled statement of facts accurately, fairly, and completely set forth the substance of Lasher's testimony. It is understandable that appellate counsel would be dissatisfied at having anything less than every precise detail of Lasher's testimony before her. However, because defendant's trial attorney certified the accuracy, fairness, and completeness of the settled statement of facts, the trial court did not abuse its discretion in acting on the latter's agreement rather than the former's disagreement. Defense counsel was actually present and participated in the proceedings from which the settled record was compiled, whereas appellate counsel came to this case as one

searching for appellate issues warranting a new trial. Because appellate counsel neither challenges the accuracy of the representations within the settled statement, nor posits any fact missing from the statement, we are satisfied that the trial court, and the parties, reasonably compensated for the lack of a transcript as contemplated by MCR 7.210(B)(2).

B. Admissibility

Defendant alleges that the trial court abused its discretion in allowing Lasher to testify regarding the typical characteristics of an abusive domestic relationship. The settled statement of facts does not indicate whether any issues relating to the substance of Lasher's testimony were preserved by appropriate objection. Review of the transcript of the settlement of the record suggests that there was no objection while the witness' testimony was in progress. However, the trial court acknowledged, from the beginning, that defense counsel would have a standing objection to the presentation of evidence concerning defendant's prior bad acts. Thus, for appellate purposes, we will deem this issue preserved.

A trial court is authorized to admit evidence from a witness "qualified as an expert by knowledge, skill, experience, training, or education" where the court "determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." MRE 702. An expert may be qualified to discourse on "battered spouse syndrome," but "only to render an opinion regarding the 'syndrome' and the symptoms that manifest it, not whether the individual defendant suffers from the syndrome or acted pursuant to it." *People v Wilson*, 194 Mich App 599, 605; 487 NW2d 822 (1992).

Defendant challenges the admissibility of Lasher's testimony on the grounds that there is no evidence that the complainant delayed significantly in reporting the alleged sexual assault, or that she ever recanted any of her allegations. However, the evidence did suggest that she engaged in other conduct that would, to a layperson, likely appear inconsistent with that of a victim of kidnapping and sexual assault. The complainant testified that she voluntarily elected to help defendant when the latter had car trouble early in the morning, and that she did not scream or run, but attempted to calm defendant with reassuring words, even patting him on the back, in the midst of the assault.

Lasher testified that abusive domestic relationships typically involve manipulation of the victim by the abuser, the latter driven by the desire to control the former, along with separations and reconciliations, the victim's state of denial, and a pattern of escalating violence. Lasher further testified that the victim often becomes compliant in the face of the abuser's violent outburst, but may try to alleviate the problem in ways stemming from the victim's familiarity with the abuser. In light of the prosecutor's theory of the case, the defense of consent, and evidence that did not obviously comport with the prosecutor's theory absent the assistance of an expert, we conclude that the trial court did not abuse its discretion in admitting Lasher's testimony. *Bahoda, supra*.

III. Prosecutorial Misconduct

Defendant alleges that prosecutorial misconduct at his first trial should have barred retrial, and, alternatively, that prosecutorial misconduct at retrial requires reversal.

A. Double Jeopardy

Defendant asserts that the prosecutor engaged in sufficiently egregious misconduct at his first trial as to bar retrial, citing the prohibition of double jeopardy in the state constitution. Const 1963, art 1, § 15.[1] We disagree. This Court reviews double jeopardy issues de novo as questions of law. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). Retrial following a mistrial stemming from innocent or even negligent prosecutorial error does not generally offend double-jeopardy principles, but the rule against double jeopardy may bar retrial where a mistrial resulted from serious prosecutorial misconduct. In *People v Dawson*, 154 Mich App 260; 397 NW2d 277 (1986), this Court held that retrial is barred where a mistrial results from intentional prosecutorial misconduct causing prejudice, done "for any improper purpose with indifference to a significant resulting danger of mistrial or reversal," and sufficiently egregious that only a mistrial can cure the error. *Id.* at 272-273, citing *Pool v Superior Court*, 139 Ariz 98, 108-109; 677 P2d 261 (1984). However, in affirming this Court's decision in *Dawson*, our Supreme Court employed the stricter federal standard, hinging on whether "the prosecutor intended to goad the defendant into moving for a mistrial." *People v Dawson*, 431 Mich 234, 236; 427 NW2d 886 (1988). The Supreme Court expressly declined to decide whether state double-jeopardy protections stemming from prosecutorial misconduct are broader than federal ones. *Id.* at 257.

We need not resolve that question either. As an initial matter, defendant fails to set forth specific prosecutorial statements in support of this argument, with appropriate record citations, and thus fails adequately to present this issue for this Court's review. MCR 7.212(C)(7); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Furthermore, our review of the prosecutor's closing arguments in defendant's first trial leads us to agree with the trial court that the any misconduct constituted nothing worse than "insignificant impropriety."[2] Because retrial was not barred under the standard applied by this Court in *Dawson*, *supra*, 154 Mich App at 272-273, retrial was certainly not barred under the narrower federal standard that the Supreme Court applied in affirming the latter, 431 Mich at 236.

B. Closing Argument

Defendant takes issue with several of the prosecutor's closing remarks. However, there was no defense objection in any such instance. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d

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[1] See also US Const, Ams V and XIV.

[2] Further militating against appellate relief is the dearth of objections to any of the prosecutor's closing arguments. The only objection defense counsel raised concerned the prosecutor's statement in rebuttal that there was no evidence contrary to that suggesting that the sex between defendant and complainant was not consensual, which the trial court properly allowed as responding to defense counsel's argument that the sex was consensual. Additionally, it bears repeating that the first mistrial resulted from juror deadlock, not prosecutorial misconduct, which itself places this case beyond the reach of *Dawson-Pool*.

130 (1999). "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

1. Denigration of Defense Counsel

Defendant alleges that the prosecutor denigrated defense counsel by characterizing defense counsel's cross-examination of the complainant as "nitpicking." We disagree. A prosecuting attorney may not personally attack defense counsel. See *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). In this case, the prosecutor resorted to the term "nitpicking" in response to defense counsel's successes in exposing minor inconsistencies in the complainant's testimony. This was fair argument intended to rehabilitate the complainant's account despite some inconsistencies. A prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

2. Comments on Credibility

Defendant alleges that the prosecutor improperly commented on the credibility of both a defense witness and the complainant. We disagree. Although a prosecutor may not suggest that he or she has personal knowledge that bears on a witness' credibility, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987).

The defense witness here at issue was Jerry Hyland, a private investigator engaged by the defense. Hyland reported that he feigned interest in purchasing the complainant's car in order to gain access to take photographs and measurements of its interior, and testified that he was unable to duplicate, with his own person inside the vehicle, some of the machinations that the complainant had reported taking place attendant to the alleged assault. Hyland's credibility, as one appearing as defendant's hired agent, was obviously an important question before the jury. The prosecutor's argument was based on the evidence and did not express a personal opinion.

The same applies to the prosecutor's admonishments to the jury that, despite inconsistencies in the complainant's testimony, she was not lying. Again, the prosecutor was responding to defense counsel's successes in exposing minor inconsistencies in the complainant's testimony, and pointing out that her testimony comported with Lasher's concerning the behavior of persons suffering from prolonged pattern of abuse. The prosecutor did not indicate that he had personal insights into the complainant's credibility.

3. Appeals to Sympathy

Defendant asserts that the prosecutor improperly urged the jury to act on sympathy for the complainant. However, defendant merely presents six page citations from the record in support of this argument, failing to identify specific words, or offer specific arguments or authority to show that any improper argument took place. A party's mere assertion that the party's rights were violated, unaccompanied by cogent argument or supporting authority, is insufficient to present an issue for consideration by this Court. MCR 7.212(C)(7); *People v*

Jones (On Rehearing), 201 Mich App 449, 456-457; 506 NW2d 542 (1993). We therefore decline to consider this argument further. Further, we note that the trial court instructed the jury not to allow sympathy to influence its verdict. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

4. References to Expert Testimony

Defendant takes issue with several of the prosecutor's references to Lasher's testimony. We conclude that most of these are proper, if spirited, argument from the evidence. *Marji, supra*. However, the prosecutor did, in some instances, push the limits of proper argument.

The prosecutor argued, "Prior to this sexual assault it was all punching, slapping and kicking, and you're no good so on and so forth. It follows everything that Ms. Lasher said. . . . [T]he expert testimony bears out that there's always this progression" In fact, Lasher testified that patterns of domestic violence did not necessarily escalate to the level of sexual assault. However, the prosecutor continued, "You take that progression, and you lay it over the top of the facts in this case and you've got it right on the money," The prosecutor was thus not arguing that lesser forms of violence necessarily lead to sexual assault, but that sexual assault is typically preceded by lesser forms of violence. This was proper argument from the evidence. The same analysis applies to the prosecutor's statement in rebuttal, "Ms. Lasher says we have as a standard the progression of escalation of violence in each and every domestic violence sexual assault. What changes is how each person reacts to each one of those escalations. The escalations is [sic] always the same . . . ." Likewise, the prosecutor's summary, "Ms. Lasher laid out a good foundation for you that mirrors everything that happened that evening, what this woman was going through." Again, the prosecutor was arguing not that escalation is inevitable, but that the violent sexual assault of which defendant was charged followed from a normal pattern of such escalation. Had there been any risk that the jury might misapprehend this line of argument, a timely instruction or special instruction would have cured any prejudice. Because these remedies would have corrected any error, defense counsel's failure to seek them forfeits appellate relief. *Launsburry, supra.*

IV. Ineffective Assistance of Counsel

Defendant alleges that, based on the issues raised on appeal, his trial counsel was ineffective. We disagree. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

A. MRE 404(b)(1) Instruction

The strictures governing admission of uncharged bad acts include that a trial court may, upon the defendant's request, instruct the jury specially concerning the limited purposes for which such evidence may be considered. *VanderVliet, supra* at 55. Defendant alleges that defense counsel's failure to seek such an instruction in this instance constituted ineffective

assistance of counsel. We disagree. In this case, at the beginning of trial, while the trial court was acknowledging defense counsel's standing objections to the MRE 404(b) testimony that was to come, the court additionally stated, "You indicated some concerns at the bench about emphasizing that testimony, and I concur. Your objection . . . is preserved . . . ." Whether or not defense counsel's desire to avoid emphasizing the bad-acts evidence took the form of eschewing a special instruction on it, the fact is that any such instruction would have been a double-edged sword, at once admonishing the jury not to use the testimony as substantive evidence of defendant's guilt in the charged conduct, and reminding the jury that it had heard evidence of defendant's earlier, uncharged violent conduct. Because a possible strategic reason for declining to ask for a special instruction is apparent,[3] counsel's failure to request such an instruction will not support a claim of ineffective assistance of counsel. See also *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000).

B. Prosecutor's Closing

Defendant alleges that defense counsel's failure to object to any of the prosecutor's remarks that form the basis of defendant's allegations of prosecutorial conduct constituted ineffective assistance of counsel. We disagree. Defendant in fact brought no argument to light that constituted misconduct, but highlighted some argument that, at worst, could have been misunderstood as suggesting that expert testimony had indicated that lesser forms of abuse always lead to sexual abuse, where the point actually made was that sexual abuse in a domestic relationship is typically preceded by lesser forms of violence. Had defense counsel expressed concerns about this, remedial action in response might have improved defendant's position. However, in light of the complainant's compelling testimony, it is doubtful that the outcome would have been different had defense counsel taken such steps. Nor did this particular disinclination to act render the trial fundamentally unfair or unreliable. Defendant thus fails to show that any failure to object to closing argument constituted ineffective assistance of counsel. *Poole, supra.*

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly

[3] In setting forth the rules governing admission of bad-acts evidence, our Supreme Court qualified only one of them, stating that the court may provide a limiting instructing "upon request." *Crawford, supra*. The Court thus obviously envisioned that a defendant may choose to forgo that option for legitimate strategic reasons.