STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

GREGORY ANDERSON,

Defendant-Appellant.

UNPUBLISHED
May 18, 2004

No. 246187
Wayne Circuit Court
LC No. 98-008045-01

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

After a bench trial, the trial court convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to four to ten years' imprisonment for the assault conviction, and two years for the felony-firearm conviction, the two sentences to run consecutively. Defendant appeals his convictions and sentences, and we affirm.

I

Defendant contends that the trial court's findings do not support the element of specific intent, and also maintains that the trial court acknowledged this deficiency in a statement made while issuing the verdict. This Court reviews the trial court's factual findings for clear error. MCR 2.613(C); *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). "Factual findings are sufficient as long as it appears that the trial court was aware of the issues in the case and correctly applied the law." *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992) (citing *People v Armstrong*, 175 Mich App 181, 185; 437 NW2d 343 (1989)).

Defendant's argument on this issue depends entirely on his interpretation of one statement made by the trial court in its findings of fact and conclusions of law. After reviewing the evidence that had been presented and declaring its findings of fact, the trial court stated: "I agree that there is no specific intent in this record. And so, I'm going to find the Defendant guilty of the felony[-]firearm and assault with intent to do great bodily harm less than murder." Defendant interprets this statement as a declaration that the trial court found no specific intent whatsoever, and specific intent is a necessary element of assault with intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). We reject this interpretation, and find that, viewed in its proper context, the trial court's statement meant that the trial court did not find specific intent *to murder*, a required element of the charge

of assault with intent to murder, but did find specific intent to commit great bodily harm. "The sufficiency of factual findings cannot be judged on their face alone; the findings must be reviewed in the context of the specific legal and factual issues raised by the parties and the evidence." *People v Rushlow*, 179 Mich App 172, 177; 445 NW2d 222 (1989), aff'd 437 Mich 149; 468 NW2d 487 (1991).

Prior to making the challenged statement, the trial court said that it believed the victim's testimony, as well as the testimony of other witnesses that put defendant at the scene of the shooting. Because the trial court believed this testimony, it properly found that defendant used a gun to inflict serious injuries on the victim, and this clearly is evidence sufficient to support a finding of intent to do great bodily harm. Furthermore the trial court's findings of fact supported its verdict. We need not remand in cases where, as here, it is "manifest that [the trial court] was aware of the factual issue, that it resolved it and it would not facilitate appellate review to require further explication of the path [the court] followed in reaching the result." *People v Jackson*, 390 Mich 621, 627 n 3; 212 NW2d 918 (1973). Accordingly, we hold that the trial court's findings of fact were sufficient to support its verdict.

II

Also, defendant says that the prosecutor improperly provided his personal recollection of facts during his cross-examination of a witness. Defendant contends that because he could not cross-examine the prosecutor, he was denied his right of confrontation. Defendant did not preserve this issue by making a timely, contemporaneous objection and request a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Therefore, we review for a plain error that affected defendant's substantial rights.[1]

Defendant's allegations of misconduct center on two exchanges between the prosecutor and a defense witness while the latter testified at trial. In both, the prosecutor asked the witness if she had previously made a statement to him. In the first exchange, the prosecutor asked the witness if she had ever told defendant that victim had been "talking bad" about him. The second exchange occurred later in the same witness' testimony. The prosecutor had asked her if another witness had tried to calm defendant down after an argument with victim prior to the shooting. After the witness seemed to deny that the other witness had even spoken to defendant, the prosecutor asked her whether she had previously told him that the other witness had, in fact, tried to calm defendant. The witness replied that the other witness had told defendant not to "mind" the victim, but then stated that this was not an attempt to calm the victim.

Defendant argues that through these exchanges, the prosecutor was unlawfully assuming the role of a witness not subject to cross-examination. MRE 607 provides: "The credibility of a

[1] To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

witness may be attacked by any party, including the party calling the witness." MRE 613 allows impeachment of a witness with that witness's prior inconsistent statements. *People v Rodriguez*, 251 Mich App 10, 34-35; 650 NW2d 96 (2002). Before using a prior inconsistent statement to impeach a witness or refresh the witness's memory, one must lay a proper foundation regarding when, where, and to whom the statement was made. *Id.* Neither MRE 607, MRE 613, nor the cases interpreting these rules state that the prior inconsistent statement cannot have been made to the prosecution. The prosecutor's statement in the first exchange was not improper testimony on his part, but was part of the foundational information required to introduce the statement. *Rodriguez, supra* at 34-35. Because the prosecutor may impeach a witness with a witness' prior inconsistent statements, we hold that it was not plain error for the prosecution to do so here.

In the second exchange, the witness does not clearly deny making the prior statement to the prosecutor. In fact, her final statements can reasonably be interpreted as an admission that she made the prior statement but disagreed with the prosecution's interpretation of what the other witness was trying to do in speaking to defendant. Where a witness does "not deny [making] the statements in question, the prosecutor's questioning function[s] more like 'refreshment' than 'impeachment,' and . . . [u]nder th[o]se circumstances, we find no error requiring reversal." *Rodriguez, supra* at 35. Because the prosecutor here was merely refreshing the witness' recollection, and he was not testifying, his questions in the second exchange were not plain error.

III

Defendant further maintains that the trial court committed error requiring reversal when it allowed the victim to testify that defendant had raped her friend. Defendant asserts two claims of error with regard to this testimony: first, that it is hearsay, and second, that it is inadmissible evidence of criminal propensity. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). An abuse of discretion occurs 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 the defiance of it. A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). However, defendant's argument that the testimony is inadmissible propensity evidence, here raised for the first time, is not preserved, *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999), and consequently, this Court's review is for a plain error that affected defendant's substantial rights.[2]

The victim testified that some time prior to the shooting, she said, within defendant's hearing, that defendant had raped her friend. Victim made this statement as she was getting back into a car after a verbal confrontation with defendant. Later, at another location, defendant shot the victim. After the victim verified that she had indeed said this, defense counsel merely said: "Excuse me. Excuse me." The trial court then stated: "Sustained. The Court will disregard it." At a later point in victim's testimony, the prosecutor again brought up victim's statement about the rape, and asked her again what she had said, whereupon defense counsel objected on the grounds of hearsay; the trial court overruled defendant's objection.

[2] *Carines, supra* at 763-764.

"Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Hearsay is not admissible except as provided by the rules of evidence." *People v McLaughlin,* 258 Mich App 635, 651; 672 NW2d 860 (2003) (internal citations omitted); MRE 801(c). The prosecutor argued at trial that the statement was not hearsay because it was not offered for the truth of the matter asserted. The prosecutor's theory of the case was that defendant, angered by things the victim had said about him, "lashed out" at her. Under this theory, it would be important to show that defendant was aware that the victim had made statements that would have angered defendant. The prosecution presented evidence that the victim had said uncomplimentary things to another witness about defendant, but that witness denied relaying this information to defendant. It was therefore important to adduce any evidence available that victim had made statements in defendant's presence that would have given him a motive to assault her. Moreover, the defense presented evidence that defendant was not upset after the argument with victim. It was therefore important to present rebuttal evidence that victim had said things to him inflammatory enough to upset a normal person.

Given the evidence presented, it would not be unreasonable to believe that defendant heard the victim's statement about the rape; his violent reaction immediately after she made it is further evidence that he heard and was angered by it. Accordingly, we find that the trial court's decision to admit the statement is not "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 the defiance of it," *Hine, supra* at 250, and hold that the trial court's decision to admit the evidence was not an abuse of discretion.

Defendant also argues that the statement regarding the rape was "improper evidence of 'criminal propensity.'" The admissibility of evidence relating to a defendant's other crimes, wrongs, or acts is governed by MRE 404(b). Evidence is admissible under this rule if it: (1) is offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) is relevant to an issue or fact of consequence at trial, and (3) is sufficiently probative to outweigh the danger of unfair prejudice, under MRE 403. *People v Starr,* 457 Mich 490, 496-497; 577 NW2d 673 (1998). MRE 404(b) provides a list of "other purposes," for which other acts evidence might be admissible, including "proof of motive . . . . " Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401; *People v Martzke (On Remand),* 251 Mich App 282, 293; 651 NW2d 490 (2002). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Martzke, supra* at 294.

The victim's testimony that she had said, within defendant's hearing, that he raped one of her friends, is relevant. Defendant's subsequent attempt to strike victim immediately after she made the statement tends to show that he was angered by it, and makes it more likely that defendant had a motive for his subsequent attack on her. The trial court stated that motive was of consequence here. We agree with the trial court, and consequently hold that the admission of this evidence was not a plain error affecting defendant's substantial rights.

IV

Defendant asserts that he was denied a fair trial by the prosecution's introduction of testimony that the victim, after being shot, suffered a miscarriage. The victim testified that she suffered a miscarriage as the result of the bullet traveling to her uterus after defendant shot her in the buttocks. Defendant says that this evidence had no probative value, was highly prejudicial, and was only presented to gain sympathy for the victim, an improper motive. Because defendant has not previously raised this issue, he has failed to preserve it, *Avant, supra* at 512. Therefore, we will review for a plain error that affected defendant's substantial rights.[3]

Our Supreme Court, in *Mills, supra* at 71, held that where the defendant's intent is an element of the charged offense, and where intent is at issue, "evidence of injury is admissible to show intent to kill." Furthermore, the severity of a victim's injuries is of consequence to the determination of whether the defendants' acts were intentional. *Id.* at 71. Defendant's intent was at issue because he made a general denial, thereby placing all elements of the charged offense at issue. *Starr, supra* at 501. Here, defendant's intent was one of the elements that the prosecutor had to prove in the case at bar. *People v Lugo,* 214 Mich App 699, 710; 542 NW2d 921 (1995). Thus, we hold that evidence of the full extent of the victim's injuries was properly admitted as material to proving defendant's intent to murder, the offense with which the prosecution charged defendant.

V

Further, defendant alleges that the verdict was against the great weight of evidence, and was based on the trial court's clearly erroneous findings of fact. A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict such that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon,* 456 Mich 625, 627; 576 NW2d 129 (1998). "A trial court's finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made." *People v Williams,* 244 Mich App 533, 537; 624 NW2d 575 (2001); MCR 2.613(C).

Defendant's argument is, essentially, that the testimony of two important witnesses was severely impeached and contradicted physical laws. When we review a trial court's denial of a motion for new trial on the basis that the verdict was against the great weight of the evidence, we defer to the trier of fact's determination regarding witness credibility unless witnesses have been impeached to the extent that their testimony has no probative value, or where the testimony defies indisputable physical facts or realities. *People v Musser,* 259 Mich App 215, 219; 673 NW2d 800 (2003), citing *Lemmon, supra* at 647. Furthermore, "[i]n general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial." *Lemmon, supra* at 625 (internal citations omitted). Our review of the record leads us to the conclusion that the testimony supporting the trial court's verdict was not "so far impeached that it was deprived of all probative value or that the jury could not believe it, or

[3] *Carines, supra* at 763-764.

contradicted indisputable physical facts or defied physical realities." *Musser, supra* at 219. Consequently, we hold that a new trial is not warranted. *Id.*[4]

VI

Defendant argues that he was denied a fair trial when the prosecutor impeached a non-alibi witness with questions about why she did not come forward to the police prior to trial with information tending to help defendant. Defendant did not object at trial to the prosecution's questioning of the witness, and so this issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, this Court's review is for a plain error that affected defendant's substantial rights.[5]

The witness in question was a non-alibi witness. Defendant maintains that the trial court erred in allowing the prosecution to cross-examine a non-alibi defense witness regarding why the witness did not come forward to police without first requiring the prosecution to lay a foundation showing that the witness would naturally have come forward to police with the information. The trial court relied upon our Supreme Court's opinion in *People v Gray*, 466 Mich 44, 46-47; 642 NW2d 660 (2002) (adopting the reasoning of *People v Phillips*, 217 Mich App 489, 552 NW2d 487 (1996)) in making its decision. Our Supreme Court, in *Gray*, expressly overruled this Court's opinion in *People v Fuqua*, 146 Mich App 250, 256; 379 NW2d 442 (1985), in which this Court held that before the prosecutor is allowed to impeach an *alibi* witness for failure to come forward and tell his story to the police before trial, there must be some showing, on the record, regarding why it would have been natural for the alibi witness to relate his story to the police. Another case, *People v Emery*, 150 Mich App 657, 666; 389 NW2d 472 (1986), had applied *Fuqua's* foundational requirement to *non-alibi* witnesses. Defendant further cited *People v Grisham*, 125 Mich App 280; 335 NW2d 680 (1983) , and *People v Perkins*, 141 Mich App 186; 366 NW2d 94 (1985), for the proposition that the prosecution may not cross-examine non-alibi witnesses regarding their failure to come forward to police without having laid the appropriate foundation. Accordingly, defendant argues, we are bound by this Court's opinions in *Emery*, *Grisham*, and *Perkins*. However, while an opinion issued by a panel of this Court on or after November 1, 1990, is binding on future panels, MCR 7.215(J)(1), opinions issued prior to that date are not binding. *People v Antkoviak*, 242 Mich App 424, 479 n 25; 619 NW2d 18 (2000). Because this Court's opinion in *Emery* relied upon its opinion in *Fuqua*, a case expressly overruled by our Supreme Court, we decline to follow *Emery*, *Perkins*, and *Grisham*, and agree with the trial court the *Gray* applies to non-alibi witnesses as well as alibi witnesses. Therefore, we hold that the trial court's decision to allow the prosecution to cross-examine the defense

[4] Defendant also claims that the trial court's factual findings were clearly erroneous. "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). However, defendant does not indicate which factual findings were clearly erroneous, and, after our review of the record, we are not left with the firm conviction that a mistake has been made.

[5] *Carines, supra* at 763-764.

witness regarding the witness's failure to come forward to police was not a plain error requiring reversal.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Karen M. Fort Hood