STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DEWAYNE LEE,

Defendant-Appellant.

UNPUBLISHED
December 20, 2005

No. 257163
Oakland Circuit Court
LC No. 2004-195634-FH

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of domestic violence, third offense, MCL 750.81(4). Defendant was sentenced, as a habitual fourth offender, to 30 months to 15 years' imprisonment for the charged offense. We affirm.

Defendant contends that insufficient evidence existed to substantiate the jury's verdict and that the trial court erred in denying his motion for a new trial. This Court reviews de novo challenges to the sufficiency of the evidence, reviewing the evidence in a light most favorable to the prosecutor, and determining whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). A trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Domestic violence is established by proving that the defendant and victim are or once were married, dating, sharing a household or have a child in common, and that the defendant either intended to batter the victim or engaged in an unlawful act that placed the victim in reasonable apprehension of being battered. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). Criminal intent "may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 482 NW2d 810 (1992). Defendant acknowledged the existence of a dating relationship with the victim, asserting only the second element of domestic violence, the existence of a battery, or apprehension of a battery, was not proven.

Circumstantial evidence, and the inferences that arise therefrom, can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is the role of the trier of fact to determine what inferences can be fairly drawn

from the presented evidence and to ascertain the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

We conclude that sufficient evidence existed to support the jury's verdict. The victim's mother testified that she was awakened by her daughter and defendant yelling and described the two individuals engaged in a physical struggle. The victim, although later denying physical contact, described a "tussle" with defendant over her cell phone. While certain details of the events recounted by police officers responding to the scene were inconsistent, both officers described injuries observed on the victim. Further, the described injuries coincided with the victim's written statement (admitted into evidence) to the police alleging defendant's physical assault upon her person.

Although the victim subsequently recanted this version of events at trial, it was not unreasonable for the jury to conclude that the victim's written statement to police was the truth and that her subsequent recitation of events was false. *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995). Given the content of the victim's original written statement to police, coupled with the observations of her mother and police officers, it was for the jury to determine which statements were true. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Based on the evidence and testimony presented, when viewed in a light favorable to the prosecution, a rational trier of fact could reasonably infer that defendant assaulted the victim, substantiating both his conviction for domestic violence and the denial of his motion for a new trial.

Defendant next contends that the trial court erred by admitting into evidence a recorded "911" call because it constituted prejudicial hearsay, and because there lacked a sufficient foundation for its authentication. Defendant preserved the foundation objection at trial, MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), but the hearsay argument is not preserved because defendant challenged the admissibility of the evidence on a different basis in the trial court. An objection raised on one ground is not sufficient to preserve an appellate attacked based on a different ground. *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992).

Typically a trial court's decision to admit evidence is reviewed by this Court for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995). Whether an item of evidence is sufficiently authenticated for admission into evidence is also reviewed for an abuse of discretion. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). To the extent this issue is unpreserved, this Court will review for plain error affecting defendant's substantial rights, in accordance with *Carines*, *supra* at 763; *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003).

Although defendant raised a foundational objection to admission of the third "911" recording, he later successfully sought the admission of all three of the "911" calls initiated by the victim. Based on defendant's own presentation of the recordings as evidence, he waived appellate review on this issue by having successfully procured the same evidence introduced to the jury. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Finally, defendant contends that the prosecutor's reference, in closing argument, to the existence of a mandatory arrest policy for domestic violence constituted improper vouching for

the credibility of witnesses and comprised prosecutorial misconduct. Defendant's assertion of prosecutorial misconduct is not preserved based on his failure to timely and specifically object to the alleged improper comments. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Because the issue of prosecutorial misconduct is unpreserved, this Court will review any alleged impropriety for plain error affecting defendant's substantial rights. *Carines*, *supra* at 752-753, 763-764; *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant primarily contends that the prosecutor engaged in misconduct during closing argument when he briefly referenced the mandatory arrest policy for domestic violence offenses. Defendant argues that this statement by the prosecutor served to improperly vouch for the credibility of the two police officers during trial and was outside the evidence presented at trial, and instead represented special knowledge of the prosecutor regarding police policy and procedure. Defendant is mistaken. The police officer testified regarding the existence of the policy at trial. Importantly, defendant's own counsel, during cross-examination, elicited testimony from one of the police officers regarding the same policy. Hence, the reference by the prosecutor during closing argument did not suggest that the prosecutor "had some special knowledge or facts indicating the witness' truthfulness." *Bahoda*, *supra* at 276-277. Additionally, in referencing the mandatory arrest policy, the prosecutor was merely commenting on the portion of the victim's written statement to demonstrate that her initial voluntary allegations were sufficient to meet the requirements necessary to effectuate defendant's arrest. As such, the comment by the prosecutor did not comprise an impermissible vouching for the credibility of witnesses, but was more accurately viewed as a permissible comment on the evidence. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). In addition, the trial court properly and specifically instructed the jury that comments by the attorneys did not constitute evidence, effectively curing any potential prejudice. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003).

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray