

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE ALLEN-JOSE UNDERWOOD,

Defendant-Appellant.

UNPUBLISHED

March 15, 2007

No. 265066

Wayne Circuit Court

LC No. 05-002795-01

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of second-degree murder, MCL 750.317, and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b(A), arguing that the trial court's comments influenced the jury and that the trial court erred by excluding certain evidence. We affirm.

Defendant failed to preserve his arguments concerning the trial court's comments by objecting below. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). But defendant preserved his evidentiary claims because they were raised in and decided by the trial court. *People v Antkowiak*, 242 Mich App 424, 430; 619 NW2d 18 (2000).

An appellate court will not reverse a conviction based on an unpreserved issue except for plain error that affected a defendant's substantial rights by resulting in the conviction of an actually innocent person or seriously affecting the integrity, fairness, or public reputation of the judicial proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). A trial court's decision to exclude evidence will not be overturned on appeal unless the trial court clearly abused its discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). An abuse of discretion occurs if the trial court's decision is outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 726 NW2d 442 (2006).

Defendant first argues that the trial court erred by scolding a witness favorable to defendant and suggesting the witness might be biased in favor of defendant. When asked during cross-examination whether the victim had lived in the house where the shooting occurred for only a couple of months, defendant's sister answered, "No, he sold drugs there." After plaintiff objected, the trial court admonished the witness that although she might have reason to help her brother, she needed to answer the question that was asked and not volunteer anything, and indicated that this was not the first time that she had offered non-responsive testimony.

In *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988), this Court opined:

[A] trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's conduct or comments pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [Citations and internal quote marks omitted.]

To determine the effect of the trial court's comments, the entire record should be considered. *Id.* Considering the whole record, we reject defendant's argument that this comment unfairly influenced the jury and undermined the witness's credibility because of the isolated nature of the remarks and also because the trial court instructed the jury at length to ignore its comments. Because jurors are presumed to follow the trial court's instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), defendant has not demonstrated that plain error occurred that affected his substantial rights. *Jones, supra* at 355.

Defendant next argues that the trial court improperly decided a key issue of fact that defendant did not act in self-defense by referring to the incident as a crime when it asked how a question that was the subject of an objection was relevant to "what happened on this day of the crime." Again, considering the entire record and presuming that the jury followed its instruction to ignore the court's comments, defendant has not demonstrated that this isolated remark constituted a plain error that affected his substantial rights. Indeed, by instructing the jury to determine whether defendant acted in self-defense, the trial court made clear that it had not decided whether any crime actually occurred and had left it to the jury.¹

Defendant next argues that the trial court erred by excluding evidence of the victim's violent propensities because MRE 404(a)(2) provides that a criminal defendant charged with homicide may introduce evidence of the alleged victim's violent character when self-defense is an issue. Because defendant actually presented evidence of the victim's violent character, defendant's argument that the trial court completely precluded such evidence lacks merit. For example, defendant's sister testified at length and repeatedly that the victim held her in his home against her will for four days, burned her face with an iron two days before the incident, deflated her car tire to keep her from leaving, and had threatened to kill her and the baby.

Although the trial court precluded defendant from introducing photographic evidence of burns that defendant's sister purportedly suffered from an assault by the victim, the trial court ruled that the evidence would be "very prejudicial" and that her condition was not relevant. "A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion."

¹ Defendant also argues that the trial court erred in referring to the incident as a crime while instructing the jury and stating, "There's been some evidence that the defendant left the crime scene or the area there after the alleged crime." However, the trial court did not plainly err by making this comment because it indicated in the same sentence that the incident was an alleged crime.

Bauder, supra at 179. Also, defendant does not point to any instance where plaintiff questioned whether this alleged assault actually occurred, and a witness favorable to plaintiff who was the victim's friend testified that the victim admitted to him he had burned defendant's sister with an iron. Even though the witness also said that the victim claimed he burned her accidentally, defendant has not cited where he argued that the excluded evidence would demonstrate that the act must have been intentional. Notably, plaintiff argued during closing argument that whether the incident with the iron occurred or not, defendant's belief that it occurred provided him with a motive to murder the victim. It is also noteworthy that defendant pointed out during closing argument that the scar was still visible at trial and described it as "pretty deep." In sum, because defendant neither shows where plaintiff disputed that the incident occurred nor explains what disputed point the photographic evidence would prove that had not already been shown, the trial court did not abuse its discretion in excluding this cumulative and potentially unfairly prejudicial evidence.² See MRE 403 (allowing exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice).

Defendant next argues that the trial court erred in precluding evidence that he had cancer and was thus extremely weak when he shot the victim in self-defense. We disagree because defendant's condition was not relevant to his self-defense theory. Defendant argued that the victim reached for a firearm intending to shoot defendant, while plaintiff argued that the victim neither had nor reached for a firearm. Thus, the issue relative to self-defense was whether the victim reached for a firearm. If the jury had believed that he did, whether defendant was too weak to physically defend himself without a weapon would not be relevant because plaintiff did not argue that defendant used excessive force but argued that defendant had no need to defend himself. Thus, the trial court did not abuse its discretion in excluding this evidence because it was not relevant to the actual defense theory. Further, despite the trial court's ruling that the evidence was inadmissible, defendant testified (partially in response to a question from the prosecutor) that he was sick and weak from cancer and that he had to have his friend drive him to the victim's home because he was dizzy, and these comments were not stricken.

Defendant also argues that plaintiff opened the door to testimony regarding his health by asking why defendant brought a friend with him to the victim's house if he merely intended to speak with him. However, defendant does not cite where he argued below that plaintiff opened the door to such testimony, nor have we found any such argument in the record.³ Thus, we find that defendant has failed to show that the trial court abused its discretion because the court was

² Defendant also argued below that the photos were needed to rebut testimony from a witness implying that defendant's sister might not have had a scar. However, when asked if she saw a scar, the witness stated clearly that defendant's sister was running the whole time the witness saw her face and that she had a pacifier in her mouth and was holding the baby. It is abundantly clear that she was explaining why she might not have seen a scar even if the sister had had one.

³ Even though plaintiff argues in his appellate brief that he argued below that the evidence should have been admitted after plaintiff opened the door to such testimony, the citation he provides for this point *precedes* plaintiff's question about why defendant brought a friend with him to the victim's house.

never asked to admit the evidence on this theory. *City of Troy v McMaster*, 154 Mich App 564, 570; 398 NW2d 469 (1986). When a trial judge's discretion has not been invoked, there can be no abuse of that discretion. *Id.*

Nevertheless, even if the trial court erred in excluding this evidence after plaintiff opened the door, the error was harmless. Although why defendant brought his friend could be relevant to the charges of premeditated murder, felony murder, and home invasion because it arguably suggests that defendant planned beforehand either to kill the victim or commit home invasion, defendant was acquitted of those charges. But the excluded evidence is not relevant to the elements of second-degree murder, nor is it relevant to defendant's self-defense theory that the victim reached for a firearm. See *Bauder, supra* at 179-180 (explaining that even preserved nonconstitutional error requires reversal only if "it affirmatively appears more probable than not that the error was outcome determinative").

Finally, defendant argues that even if each error complained of would not by itself warrant reversal, the cumulative effect of multiple errors would warrant reversal. Because defendant did not state this issue in his statement of questions presented, it is not properly presented for appellate review. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Moreover, in determining whether a criminal conviction should be reversed because of the effect of cumulative errors, "only actual errors are aggregated to determine their cumulative effect." *People v LeBlanc*, 465 Mich 575, 592, 640 NW2d 246 (2002). The only arguable error would be the trial court referring to the incident as a crime. Because there are no other errors, cumulative error requiring reversal cannot have occurred.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly