STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2007
v	No. 271162 Oakland Circuit Court
MICHAEL JOHN FILIPIAK, Defendant-Appellant.	LC No. 2005-203736-FH

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant was charged with three counts of first-degree home invasion, MCL 750.110a(2), and two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(c). Following a jury trial, defendant was convicted of one count of first-degree home invasion and one count of third-degree criminal sexual conduct, and he was acquitted of all other counts. Defendant was sentenced to 51 months to 20 years in prison for the first-degree home invasion conviction and 51 months to 15 years in prison for the third-degree criminal sexual conduct conviction. We affirm.

I. FACTS

Defendant had known the victim in high school, and they met again 20 years later in 1999. They went on one date, but the victim indicated that she was not interested in a romantic relationship with defendant. During the summer of 2000, the victim needed a place to stay for a time, and defendant rented her a room at his residence. The victim stayed at defendant's home for six months, and she dated other people during this time. At the end of her stay, defendant began trying to enter the victim's bedroom when it was locked and would breathe heavily at the door. After she moved, the victim and defendant remained friends. However, when she began dating someone else, defendant began to bother and harass her. But after defendant got married, he did not bother the victim from 2001 to 2003.

In May 2004, defendant helped the victim purchase a car and furniture. They also took several trips together. The victim testified that she and defendant never had a sexual relationship. But, after awhile, defendant began calling the victim constantly at work and home, and he would also call her friends and family. Defendant also began following the victim at home, bars, and restaurants. She never gave defendant keys to her apartment. But she testified that in August 2004, she woke up and found defendant in bed with her. Defendant did not have

any pants on, and she was no longer wearing any underwear. And again in January 2005, the victim awoke to find defendant in her bed. Both times, defendant explained that he had raped her because he wanted to get her pregnant. After the second incident, the victim noticed a white residue in the bottom of her water glass. Defendant said he had put sleeping pills in her water to effectuate both rapes.

In 2004, the victim began dating David Orr. On several occasions, defendant would come to the victim's apartment and pound on the door until Orr would chase him away. In January or February 2005, Orr helped the victim move to another apartment so defendant would not find her. But defendant did find out where she lived and started to harass her again. Defendant loosened the lug nuts on the victim's car in an attempt to injure Orr. Defendant also left a hand written note on the victim's car explaining that he had a right to vandalize her car. On June 14, 2005, defendant entered the victim's apartment and took her purse and Orr's wallet. On June 15, 2005, police arrested defendant when they found him near the victim's apartment.

II. PROSECUTORIAL MISCONDUCT

Defendant first argues that, although the trial court did not allow defendant's ex-wife to testify regarding his sexual misconduct with her, the prosecutor improperly introduced this information through the unredacted audiotape of telephone conversations between defendant and the victim and elicited testimony from defendant and the victim regarding the prohibited information. We disagree.

A. Standard of Review

Defendant failed to preserve this issue regarding the testimony at trial because he did not object to the prosecutor's questioning, thereby depriving the trial court the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Unpreserved claims of error are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture: (1) an error must have occurred; (2) the error must be clear or obvious; and (3) the error must have affected substantial rights, meaning it affected the outcome of the trial. *Id.* at 763.

Defendant waived this issue regarding the admission of the unredacted tape because defense counsel stated that there was no objection to its admission and that the defense welcomed this exhibit. In addition, defense counsel played portions of the tape during defendant's direct examination. "'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right."'" *Carines*, *supra* at 762 n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). If a defendant waives his rights, rather than forfeits them, that waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor's line of questioning is reviewed to determine whether the prosecutor elicited the testimony in good faith. *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007). Reversal is warranted if improper questioning resulted in the

conviction of an innocent defendant. See *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). A prosecutor may fairly respond to an issue raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995).

B. Analysis

Before trial, the court denied the prosecution's request to admit defendant's first wife's testimony about defendant's assaults and home invasion perpetrated upon her in 1998 and 1999. The trial court ruled that the evidence was relevant and showed a common system, scheme or plan. However, the trial court expressed serious concerns over the probative value of the testimony because defendant's ex-wife lacked personal recollection of what exactly took place so many years ago, she did not have fear of a sexual assault, and an attorney had advised her that a personal protection order (PPO) would help her in the divorce proceeding. The court was concerned that the jury might unfairly weigh the evidence of the earlier incidents to the prejudice of defendant. In accordance with the court's ruling, the prosecution never called defendant's ex-wife as a witness.

In the first recorded phone call between the victim in this case and defendant, the victim brought up defendant's ex-wife and accused him of raping and stalking her. Defendant asked, "Do we have to talk about this?" The victim replied that she was afraid defendant would do the same thing to the next girl, and defendant said that he never did it to his second wife because he was in love with the victim while he was married to her. The victim's allegation that defendant stalked and raped his first wife was a small part of the entire conversation and was in the context of several allegations of stalking, rape, vandalism, and the victim's pleas to defendant to leave her alone. The recordings were relevant to the case and not prohibited by the court. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek*, *supra* at 70.

Contrary to the victim's testimony, defendant testified that he was never in her apartment without permission, never put sleeping pills in her water, and did not have sex with her against her will. Defendant claimed that he said the words on the recorded conversation because he was going along with the victim and trying to appease her so she would consider seeing him again. On cross-examination, the prosecutor began going through each part of the transcript of the recordings to show the weaknesses in defendant's contention that he was just appeasing the victim. When the prosecutor got to the line where the victim accused defendant of stalking and raping his ex-wife, defendant responded, "That's what she says, yes." The prosecutor pointed out that defendant did not deny the victim's allegation, and defendant agreed. This questioning was among numerous examples where the prosecutor pointed out all the opportunities that defendant had during the conversation to deny the victim's different allegations of stalking, rape, and vandalism. The prosecutor was properly responding to an issue raised by defendant. *Fields*, *supra* at 110-111.

In addition, the trial court instructed the jury that the attorney's statements and questions were not evidence and that the jury was not to consider excluded evidence or stricken testimony. Therefore, any possible error was dispelled by the court's instruction and would not have affected the outcome of the trial. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Accordingly, defendant was not deprived of a fair trial by the prosecutor's line of questioning or the playing of the tape for the jury.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he was deprived of the effective assistance of counsel because defense counsel failed to object to the prosecutor's misconduct in circumventing the trial court's ruling concerning evidence relating to his first wife. Again, we disagree.

A. Standard of Review

Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law; we review the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

We have already concluded that defendant's arguments regarding these issues are without merit. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). In addition, defense counsel stated that the defense welcomed the telephone recordings because the jury would hear a denial rather than a confession. Defense counsel's theory was that defendant was saying whatever was necessary to appease the victim's badgering because he loved her. Defense counsel's actions were part of his trial strategy, and this Court will not substitute its judgment for that of counsel in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Thus, the evidence shows that trial counsel's performance did not fall below an objective standard of reasonableness, and defendant was not deprived of a fair trial.

IV. MRE 404(b) EVIDENCE

Next, defendant contends that the trial court erred in allowing evidence that defendant loosened the lug nuts on the victim's car because it was not relevant and was admitted solely to show defendant's propensity to commit a crime. We disagree.

A. Standard of Review

"In order to preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Defendant did not object to the testimony regarding the vandalizing of the victim's car but did object to the admission of a letter defendant wrote admitting to the acts. Therefore, this issue is only partially preserved for review.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court defers to the trial court's judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Unpreserved issues are reviewed for plain error affecting substantial rights. *Carines supra* at 763-764.

B. Analysis

Michigan Rule of Evidence 404(b) governs the admissibility of evidence of "other crimes, wrongs, or acts." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "Evidence of extrinsic crimes, wrongs, or acts of an individual generally is inadmissible in a criminal prosecution to prove that the defendant possessed a propensity to commit such acts." *People v Hall*, 433 Mich 573, 579; 447 NW2d 580 (1989); see also MRE 404(b)(1). The purpose of this rule is to prevent a conviction based on defendant's history of misconduct rather than the facts of the present case. *Starr, supra* at 495.

To be admissible, evidence of other bad acts must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by the potential for unfair prejudice. *Knox*, *supra* at 509. "'Relevant evidence' means 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. "'[T]he probative value [of similar acts evidence] outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense.'" *People v Wright*, 161 Mich App 682, 687; 411 NW2d 826 (1987), quoting *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973) (alteration by the *Wright* Court).

In this case, the prosecutor elicited testimony that defendant loosened the lug nuts on the victim's car and said that he had wanted to kill the victim's boyfriend, David Orr. Later, defendant left a handwritten note on the victim's car, indicating that he had a right to vandalize her car and that he was angry because a beautiful woman was taken away. In addition, defendant himself testified that he threw a bunch of crumpled up newspapers in the victim's car and took off the lug nuts because he was angry that she was seeing Orr. Defendant thought that taking the lug nuts would cause the wheel to fall off, and the victim would crash into something, harming Orr.

Taken in the context of the case and defendant's defense that he had consensual sex with the victim, the testimony and letter regarding the lug nuts was highly relevant and not unfairly prejudicial. Defendant's act of vandalism was among a variety of acts that constituted harassment and stalking that supported the victim's allegations that she did not consent to the incidents in question. For example, there was testimony that defendant was able to procure keys to the victim's apartments on several occasions, would continuously pound on the victim's door in the middle of the night, called the victim and her family members incessantly, was able to find out where the victim had moved, entered the victim's apartment without permission and took her belongings, and had tried to hit Orr with his car. Facts preceding and inducing the principal offense that would tend to throw light on the offense itself are relevant and admissible as a link in the chain of testimony. *DerMartzex*, *supra* at 414. Therefore, the trial court did not err in admitting evidence that defendant vandalized the victim's car.[1]

[1] We note that defendant also argues that defense counsel was ineffective for failing to object to the admission of the testimony about defendant vandalizing the victim's car. However, because we have concluded that the testimony was properly admitted, any objection by defense counsel would have been meritless. And, again, defense counsel was "not required to advocate a

(continued…)

V. FAIR TRIAL

We also reject defendant's argument that the trial judge denigrated defense counsel in front of the jury, depriving defendant of a fair trial.

A. Standard of Review

This issue is not properly preserved for review because defendant did not object to the trial judge's comments at trial. *People v Sharbnow*, 174 Mich App 94, 99; 435 NW2d 772 (1989). Therefore, it is reviewed for plain error. *Carines*, *supra* at 763-764.

B. Analysis

A trial judge has wide discretion in matters of trial conduct but must maintain judicial impartiality. *Sharbnow*, *supra* at 99. A defendant has a right to representation by an attorney who is treated with due consideration. *People v Anderson*, 166 Mich App 455, 461; 421 NW2d 200 (1988). "Trial judges who berate, scold and demean a lawyer, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary to a fair hearing." *Id.* at 462. However, the trial judge may admonish or fine counsel in the jury's presence and tell the jury to disregard improper questions or comments where counsel and witnesses persistently continue to ignore the court's warnings. *People v Williams*, 162 Mich App 542, 546-547; 414 NW2d 139 (1987). Reversal is necessary only when the trial court's conduct unduly influenced the jury, thus denying the defendant a fair and impartial trial. *People v Wigfall*, 160 Mich App 765, 774; 408 NW2d 551 (1987).

Defendant alleges that the trial judge denigrated defense counsel with the comment, "Now, I've had to remind you at least a dozen times not to ask leading questions on direct examination." The trial judge then threatened to sanction defense counsel if he continued to disregard the rules of evidence. Before this point, the trial judge warned defense counsel five times to simply ask questions without adding comments and five additional times not to ask leading questions. In addition, even after the warning at issue, the trial judge had to warn defense counsel not to lead the witness six more times.

Taken in the context of defense counsel's persistent disregard for the trial judge's warnings throughout the trial, all of which occurred in the jury's presence, the trial judge's reprimand was slight and did not demean defense counsel. *Anderson*, *supra* at 462. There is no indication that the comment in question unduly influenced the jury, especially given the fact that it apparently did not even influence defense counsel because he continued asking leading questions throughout the rest of the trial. Defendant was not denied a fair and impartial trial, and reversal is not warranted. *Wigfall*, *supra* at 774.

VI. AMENDMENT OF INFORMATION

(…continued)

meritless position." *Snider*, *supra* at 425.

Finally, defendant contends that he was denied his constitutional right to adequate notice of the charges when the trial court allowed the prosecution to amend the information after the close of the proofs. We disagree.

A. Standard of Review

This Court reviews a trial court's decision to grant or deny a motion to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003).

B. Analysis

"[A] trial court may amend an information before, during, or after trial to conform with the evidence as long as the defendant is not prejudiced in his or her defense." *People v McGhee*, 268 Mich App 600, 629; 709 NW2d 595 (2005), citing MCL 767.76. A defendant is prejudiced when the amendment causes "unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

The victim testified that, in late August 2004, she woke up and found defendant in her bed with no pants on. The victim was no longer wearing underwear. Defendant told the victim he raped her because he wanted her to have his babies. In the third recorded telephone conversation, the victim was questioning defendant about the rape and the sleeping pills, and defendant asked why they were talking about something that happened six months ago. The victim replied that she was going over it with her therapist and needed answers. Defendant told the victim to tell the therapist that he wanted to have babies with the victim.

During cross-examination of defendant, the prosecutor questioned defendant about the date of the third phone call, and defendant replied that the phone call took place in March or April 2005. Defendant then agreed that, going back six months from March, he and the victim would have been talking about an incident that occurred in September 2004. Based on this testimony, before the closing arguments, the prosecutor moved to amend the information for the home invasion and criminal sexual conduct charges relating to the August 2004 incident to include the date of "August or September 2004." The prosecutor argued that the amendment was to conform to defendant's testimony, which the prosecution did not have before trial, and there was no prejudice because the defense's theory of the case would not have changed.

Defense counsel argued that the defense was prejudiced because he would have cross-examined the victim differently to attack her credibility and memory of the dates. The trial court allowed the amendment, finding that there was no prejudice because the defense theory was that the sex was consensual, and the time frame would not have significantly impacted the manner of cross-examining the victim.

There is no indication that adding a month's range to the information for this incident prejudiced defendant. There was no additional charge to defend, and the prosecution was merely trying to avoid confusion for the jurors in the event they believed that proof of the exact date of the incident was necessary in reaching a verdict. In addition, during cross-examination of the victim, defense counsel asked the victim if she remembered the exact date of the incident, and she did not. Upon further pressing, the victim could only say that the incident happened in the

later part of the month. There is no indication that defense counsel would have questioned the victim differently based on this amendment. All the testimony about the date of this incident was approximate, and amending the information to reflect approximate dates did not unfairly surprise or prejudice defendant.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette