

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH HENRY DUNCIL,

Defendant-Appellant.

UNPUBLISHED

March 13, 2008

No. 273116

Macomb Circuit Court

LC No. 2005-005112-FC

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to consecutive prison terms of 15 to 30 years for the murder conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

Defendant was convicted of fatally shooting his girlfriend, Nicole Hirth, in the bedroom of a trailer owned by Hirth's sister, Holly Martin. Defendant left the trailer immediately after the shooting. At trial, Tammy Leipus testified that she heard defendant and Hirth fighting before Hirth was shot. Another tenant in the park, Crystal Williamson, testified that on the night before Hirth's death, defendant played "Russian roulette" by pointing a half-loaded revolver at Hirth and pulling the trigger. Hirth's mother, Laura Hirth, also testified that she saw defendant threaten Hirth with a gun on the day before the shooting.

Holly Martin denied hearing any fighting between defendant and Hirth before the shooting. The trial court permitted defendant to introduce the preliminary examination testimony of James Green, an unavailable witness. Green testified that he was in the trailer when Hirth was shot. Green stated that he heard "playing and wrestling" before the shooting. After the shooting, defendant came out of the bedroom and said to call an ambulance because "he made a mistake and shot her," or words to that effect. The jury acquitted defendant of first-degree murder, but convicted him of the lesser offense of second-degree murder and felony-firearm.

II. PROSECUTORIAL MISCONDUCT

Defendant first argues that he was denied a fair trial because of the prosecutor's repeated misconduct. We disagree.

A. Standard of Review

Defendant did not object to the prosecutor's conduct at trial; therefore, his claims of misconduct are not preserved. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Accordingly, we review defendant's claims for plain error affecting his substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To avoid forfeiture under the plain error rule, defendant must demonstrate that: "(1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights." *Id.*

B. Analysis

Defendant's claims of misconduct are based on the prosecutor's questioning of witnesses. A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Here, however, defendant suggests that the prosecutor did not act in good faith.

Defendant first argues that the prosecutor violated MRE 609 by impeaching Green with his prior armed robbery conviction, and by impeaching Martin with her prior conviction for automobile theft. Defendant contends that neither of the prior convictions were admissible for impeachment under MRE 609.

MRE 609 provides:

(a) General Rule. For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

* * *

(c) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the

conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

* * *

(e) **Juvenile Adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule, except in subsequent cases against the same child in the juvenile division of a probate court. The court may, however, in a criminal case or a juvenile proceeding against the child allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding.

Defendant argues that Green's prior robbery conviction was not admissible for impeachment under MRE 609(c), because Green was released from his confinement for that conviction in September 1995, more than ten years before defendant's trial. However, because there was no objection to this evidence at trial, information regarding Green's actual release date does not appear in the lower court record. Defendant acknowledges that the lower court record lacks factual support for his claim, but relies on a printout from the Michigan Department of Corrections Offender Tracking Information System (OTIS) website and requests that this Court take judicial notice of the accuracy of the information in the printout. MRE 201(b) provides that a fact may be judicially noticed if it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The home page for the OTIS website contains the following disclaimer:

The Department of Corrections and the State of Michigan offer this information without any express or implied warranty as to its accuracy. The information on the database may not accurately reflect the most current location, status, projected release date or other information regarding an offender. Although every effort is made to maintain accurate records on this database, no action should be taken as a result of information found herein without confirmation with the MDOC, the Michigan State Police through the use of their Internet Criminal History Access Tool (ICHAT) or a review of the court file. [See <http://www.state.mi.us/mdoc/asp/otis2.html>.]

In light of this disclaimer, we conclude that the OTIS website does not qualify as a source whose accuracy cannot reasonably be questioned. Accordingly, we decline to take judicial notice of the website information. The record does not otherwise disclose Green's release date for his armed robbery conviction. As a result, defendant has not established a plain error.

Defendant also argues that the prosecutor improperly cross-examined Martin regarding her prior conviction for automobile theft. Defendant asserts that it is apparent from Martin's testimony that the conviction actually involved a juvenile adjudication, which is inadmissible for impeachment under MRE 609(e). Martin testified at trial that she was 23 years old. The prosecutor identified Martin's prior conviction as a 1997 conviction for stealing a car. Thus, Martin would have been a juvenile at the time of the conviction. Defendant did not object to this evidence at trial, however, and the record does not include any information concerning the actual

nature of the prior offense. It is possible that, although a juvenile, Martin was convicted as an adult under MCL 712A.2d. The prosecutor referred to the prior offense as a conviction, not a juvenile adjudication. On this record, it is not apparent that the prosecutor's impeachment constituted plain error.

Furthermore, even if the prosecutor's impeachment of either Green, or Martin, or both, constituted plain error, defendant has not demonstrated that the error affected his substantial rights. Although defendant contends that Green's and Martin's testimony firmly refuted the prosecutor's theory that the shooting was premeditated, the jury acquitted defendant of premeditated murder. Defendant also asserts that without the impermissible attacks on Green's and Martin's credibility, the jury might have convicted him of the lesser offense of involuntary manslaughter. The jury was instructed on involuntary manslaughter under the theory that "defendant caused the death of Nicole Hirth" and "defendant acted in a grossly negligent manner." Martin testified that she did not see defendant shoot Hirth and did not know anything about the circumstances of the shooting. Although Green testified that he heard a gunshot and saw defendant run from the bedroom and state that "he made a mistake and shot her," or words to that effect, he too did not see the actual shooting. Thus, to the extent that the evidence supported an involuntary manslaughter instruction, we conclude that Martin's and Green's testimony added little, if any, support for this theory. Accordingly, defendant has failed to show that the prosecutor's allegedly improper impeachment affected his substantial rights.

Defendant next argues that the prosecutor improperly questioned Officers Vizbarra and Priest regarding their prior contacts with defendant. Defendant argues that testimony that the officers knew defendant from prior contacts was inflammatory because it portrayed him as a career criminal.

Officer Priest testified that he arrived at the trailer park within minutes after receiving the dispatch and helped secure the trailer park and search for defendant. Officer Priest explained that he was aware from his prior contacts with defendant that defendant did not have a car, so he assumed that defendant was still in the area. Viewed in context, the testimony was relevant to explain the basis for Officer Priest's belief that defendant was still in the area, and also to provide a basis for his identification of defendant at trial. Similarly, Officer Vizbarra's testimony that he knew defendant before the charged offense was relevant to Officer Vizbarra's identification of defendant at trial. In neither instance did the prosecutor inquire into the nature of the officers' prior contacts with defendant. Accordingly, we conclude that the testimony did not constitute plain error and did not affect defendant's substantial rights.

Next, defendant argues that the prosecutor improperly injected other bad acts evidence, contrary to MRE 404(b), during his questioning of Tammy Leipus and Holly Martin.

MRE 404(b)(1) prohibits evidence of prior bad acts to prove a person's character, but allows such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act. To be admissible under MRE 404(b)(1), the evidence must be offered for something other than a character or propensity theory, it must be relevant under MRE 401, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004). 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 Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Even evidence that is relevant “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” MRE 403; *Aldrich, supra*.

The prosecutor elicited from Leipus that defendant and Hirth fought often. Evidence of discord in defendant and Hirth’s relationship was relevant to the issue of motive. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Motive is a proper, non-character purpose for which evidence of prior bad acts may be received. *Knox, supra* at 509-510. Accordingly, the prosecutor’s questioning of Leipus did not amount to plain error.

We also reject defendant’s argument that the prosecutor improperly bolstered Leipus’s credibility by implying that her testimony was consistent with her prior police statement. The prosecutor merely asked Leipus whether she had signed and dated a statement that she gave to Detective Monior. The contents of the statement were not disclosed, nor did the prosecutor give any indication that the statement was consistent with Leipus’s trial testimony. Although the prosecutor’s purpose in eliciting that Leipus had given a prior statement is unclear, it is not clear or obvious that he did so in order to bolster Leipus’s credibility.

Further, the prosecutor did not engage in misconduct by questioning Martin regarding defendant’s ownership of a gun. Evidence that defendant had access to and his prior familiarity with guns was probative of whether the shooting may have been accidental. Likewise, the prosecutor’s questions regarding Russian roulette were relevant to the issue of defendant’s intent, i.e., whether he acted purposefully and deliberately when he shot Hirth. Accordingly, defendant has not demonstrated a plain error affecting his substantial rights.

III. EVIDENTIARY ISSUES

Next, defendant raises the same issues discussed in section II, but addresses them here as evidentiary errors rather than prosecutorial misconduct.

A. Standard of Review

Again, defendant did not object to the evidence at trial; therefore, our review is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

B. Analysis

Our analysis of the prosecutorial misconduct issue applies equally here. For the reasons explained in section II, defendant has failed to establish that the prosecutor’s questioning of witnesses led to testimony that can be characterized as plain error, or that affected his substantial rights. Further, we reject defendant’s contention that the trial court was obligated to make an objective inquiry into the admissibility of Green’s and Martin’s prior convictions under MRE 609 in the absence of an objection. As previously explained, it is not clear from the record that the prior convictions were inadmissible under MRE 609. Additionally, even if the prior convictions were inadmissible, defendant has not shown that the impeachment evidence affected his substantial rights.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that defense counsel's failure to object to the matters discussed in section II of this opinion denied him the effective assistance of counsel. We disagree.

A. Standard of Review

Defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, this Court's review is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

B. Analysis

To establish ineffective assistance of counsel, defendant must show that (1) his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) but for his attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

In light of our conclusion in section II, that the substance of the testimony elicited by the prosecutor did not amount to plain error, we conclude here that there is no basis for finding that defense counsel was ineffective for failing to object. Trial counsel is not required to advocate a meritless position or make a futile objection. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, we previously concluded that any error in the admission of Green's and Martin's prior convictions for impeachment under MRE 609 did not affect defendant's substantial rights. It therefore follows that defendant cannot establish the requisite prejudice to prevail on a claim of ineffective assistance of counsel with respect to that matter.

V. CUMULATIVE ERROR

Finally, we reject defendant's cumulative error argument.

A. Standard of Review

We review a defendant's cumulative-error argument to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). To reverse on the grounds of cumulative error, the errors complained of must be of consequence. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Indeed, "the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Knapp, supra* at 388.

B. Analysis

Here, we conclude that defendant has not shown errors of consequence which, when combined, had a prejudicial effect so serious that defendant was denied a fair trial. Therefore,

reversal is not required.

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette