

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY LEE BAUGHAN,

Defendant-Appellant.

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UNPUBLISHED

July 29, 2008

No. 276323

Ingham Circuit Court

LC No. 05-001333-FH

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a, and possession of a taser, MCL 750.224a.<sup>1</sup> Defendant appeals as of right. Because defendant's convictions are not against the great weight of the evidence and because the trial court did not abuse its discretion in denying defendant's motion for a mistrial, in prohibiting defendant from introducing extrinsic evidence of the victim's past threats to falsely accuse family members of assault, or in admitting evidence of defendant's prior possession of a taser, we affirm.

Defendant first claims that the verdict was against the great weight of the evidence. To preserve for appellate review a claim that the verdict is against the great weight of the evidence, the defendant must raise the issue in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Here, defendant raised the issue in a motion for a new trial, but he withdrew the motion before it was decided by the trial court. Accordingly, the issue is unpreserved. See *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004) (an issue is not properly preserved for appellate review unless it was raised before and decided by the trial court). Thus, we review defendant's claim for plain error affecting his substantial rights. *Musser, supra* at 218.

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage for the verdict to stand. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Defendant's convictions are supported

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<sup>1</sup> Defendant was acquitted of assault with intent to do great bodily harm, MCL 750.84.

by the testimony of the victim. The victim identified defendant as the man who broke into her home and then tasered her. Although defendant presented conflicting evidence regarding his whereabouts on the night of the home invasion and evidence that the victim had a reputation for untruthfulness, “[c]onflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial.” *Id.* Because we cannot say that as a matter of law the conflicting and impeaching testimony deprived the victim’s testimony of all probative value that it could not be believed by the jury, the credibility of the witnesses was for the jury. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Defendant’s convictions were not against the great weight of the evidence.

Second, defendant claims the trial court erred in denying his motion for a mistrial. According to defendant, he was denied his right to due process and to a fair trial when Frances McClure, his alibi witness, was arrested in front of the jury. Defendant argues that the government’s action not only undermined the credibility of McClure, but that the prosecution was attempting to intimidate McClure from testifying. We review a trial court’s denial of a motion for mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). Reversal is only required where the trial court’s decision deprived the defendant of a fair trial and resulted in a miscarriage of justice. *People v Vettese*, 195 Mich App 235, 246; 489 NW2d 514 (1992). The defendant must make an affirmative showing of prejudice resulting from the trial court’s decision. *Id.*

Intimidation of a witness is strongly condemned. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992). However, there is no evidence that McClure’s arrest intimidated her from testifying on defendant’s behalf. The morning defendant requested a mistrial, McClure was in the courthouse and had signaled her desire to testify, and the following day, she testified. Her testimony was favorable to defendant, providing him an alibi for his whereabouts on the night of the home invasion. Thus, it is clear that McClure was not intimidated by her arrest from testifying for defendant.

In addition, defendant has not established that any of the jurors actually saw McClure being arrested. Although defendant claims he submitted affidavits to the trial court to support the assertion that McClure was arrested in view of the jury, no such affidavits are in the record, nor were such affidavits referenced by defendant when he argued for a mistrial. Further, at the close of trial, the trial court instructed the jury to decide the case based on the admitted evidence. It then explained to the jury what was and was not admitted evidence. The jury was also instructed on how to assess witness credibility. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Under these circumstances, we affirm the trial court’s order denying defendant’s motion for a mistrial. The trial court’s decision did not deprive defendant of a fair trial or result in manifest injustice. *Vettese, supra.*

Third, defendant claims the trial court erred in prohibiting him from introducing extrinsic evidence of the victim’s past threats to falsely accuse family members of assault. We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

The trial court held that extrinsic evidence of the victim's past threats to falsely accuse family members of assault was inadmissible under MRE 608.<sup>2</sup> The admission of character evidence of a witness is governed by MRE 607, 608, and 609. MRE 404(a)(4).<sup>3</sup> MRE 608(b) provides, in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence.

Defendant was not seeking to attack the victim's credibility with the conviction of a crime. Consequently, the trial court did not abuse its discretion in prohibiting defendant from introducing extrinsic evidence of the victim's past threats to falsely accuse family members of assault.<sup>4</sup>

We also reject defendant's claim that, because he was not able to present extrinsic evidence of the victim's past threats, he was denied the right to present a defense. The right to present a defense, US Const, Am VI; Const 1963, art 1, § 20, is not absolute. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "[T]he accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* (internal quotations and citations omitted). The inability of defendant to present extrinsic evidence of the victim's past threats to falsely accuse family members of assault did not prevent defendant from asserting his alibi defense. Defendant presented an alibi witness, and he also testified as to his whereabouts on the night of the home invasion. In addition, defendant solicited testimony from numerous witnesses that the victim had a reputation of untruthfulness, and he was able to question the victim regarding the inconsistencies in her testimony.

Finally, defendant claims the trial court erred in allowing the prosecution to present evidence that he possessed a taser on a prior occasion. According to defendant, this evidence was impermissible propensity evidence. We review a trial court's decision to admit evidence for an abuse of discretion. *Martin, supra*.

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<sup>2</sup> Defendant claims the trial court erred in relying on MRE 608 because, pursuant to MRE 404(b), he intended to use the extrinsic evidence to prove that the victim acted in accordance with a common scheme and to prove the victim's motive and intent. However, a review of the record belies defendant's assertion. Upon questioning by the trial court, defendant asserted that he wanted to use the victim's past threats to attack her credibility. Accordingly, we will not address defendant's argument on appeal that extrinsic evidence of the victim's past threats was admissible under MRE 404(b).

<sup>3</sup> MRE 404(a)(2) does not apply because the present case was not a homicide prosecution.

<sup>4</sup> In addition, extrinsic evidence of the victim's character trait for truthfulness was not admissible under MRE 405(b). The victim's character trait for truthfulness was not "an essential element of a charge, claim, or defense." See *People v Harris*, 458 Mich 310, 317-318; 583 NW2d 680 (1998).

Heather Dilts testified that, when defendant lived in her home from June through September 2005, defendant possessed a taser. Clearly, defendant's possession of a taser on an earlier occasion was relevant evidence. His earlier possession of a taser makes it more probable that he possessed a taser on January 8, 2005. See MRE 401. While "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," MRE 404(b)(1), evidence of similar misconduct is admissible "to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "[T]here must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). In addition to her testimony that defendant possessed a taser when he lived in her home, Dilts testified that defendant was not bashful about showing the taser off to her and others, including instances of tasing his dog and "zapping it" in front of the guests at a party. This evidence of defendant's uncharged acts of prior possession and use of a taser supports the inference that defendant employed the plan or common scheme of possessing and using a taser. Accordingly, the trial court did not abuse its discretion in admitting evidence of defendant's prior possession of a taser. *Martin, supra*.<sup>5</sup>

Finally, because the trial court did not commit any errors, defendant's argument that the trial court's cumulative errors denied him a fair trial is without merit.

Affirmed.

/s/ David H. Sawyer  
/s/ Kathleen Jansen  
/s/ Joel P. Hoekstra

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<sup>5</sup> Even if the trial court did error in admitting evidence of defendant's prior possession of a taser, reversal is not required. A preserved, nonconstitutional error is presumed to be harmless, and the defendant bears the burden to show the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Defendant has not shown that the error, if any, was not harmless.