STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2008
v	No. 278169 Livingston Circuit Court
JOHN ALDON CORRION, Defendant-Appellant.	LC No. 06-016087-FC

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of solicitation of murder, MCL 750.157b(2). He was sentenced as a second-felony habitual offender, MCL 769.10, to a prison term of 21 years and 10 months to 40 years. He appeals as of right. We affirm.

Defendant was previously convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, for assaulting his ex-wife. He was sentenced to probation, with the first year to be served in jail. He was serving this one-year sentence when he was charged, in the present case, of soliciting another jail inmate to murder his ex-wife.

On appeal, defendant has submitted a brief through appointed appellate counsel and also a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4.

I. Effective Assistance of Counsel

Defendant first argues, both through appellate counsel and in propria persona, that his right to the effective assistance of counsel was violated. We disagree.

Because defendant failed to raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Hoag, supra*, at 6. To establish prejudice, defendant must show that there is a reasonable probability that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312.

A. Entrapment Defense

Defendant argues through appellate counsel and in propria persona that defense counsel was ineffective for failing to raise an entrapment defense. We disagree.

"[U]nder the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). "[W]here law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist." *Id*. This is a modified objective test that is considered to be more favorable to the defendant than the subjective federal entrapment test. *Id*. at 508.

In *Johnson*, the Court explained:

> When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. [*Id*. at 498-499.]

In this case, even if the jailhouse informant could be considered a government agent for purposes of the entrapment defense, there is no basis in the record for concluding that governmental activity impermissibly induced defendant's criminal conduct. The informant denied encouraging defendant to commit the crime or appealing to defendant's sympathy as a friend, and the informant did not offer any inducements or enticements to defendant to commit the crime. Defendant also was not told that the contemplated act was legal, and the government, through the informant, did not exert any pressure on defendant to commit the crime. Further, there was no investigation targeted on defendant until after the informant initiated contact with the police. By that time, however, defendant had already solicited the informant to kill the

victim. Although the police thereafter exercised a degree of control over the informant, that control was directed simply at gathering evidence. The government's conduct, however, did not tend to escalate the culpability of the crime. These facts do not support a claim that the police engaged in impermissible or reprehensible conduct that would induce a hypothetical law-abiding citizen to commit a crime under similar circumstances. Rather, the police simply used an informant to gather evidence concerning the already-completed crime of solicitation of murder. At most, the police simply provided defendant another opportunity to solicit the informant. Because the record does not support a claim of entrapment, defense counsel was not ineffective for failing to pursue this meritless defense. *People v Lloyd*, 459 Mich 433, 447-451; 590 NW2d 738 (1999).

B. Motion in Limine

Defendant also argues that defense counsel was ineffective for failing to timely bring a motion in limine for discovery of the informant's calls to numbers outside the jail, and for not confining his untimely request to telephone calls made after defendant was moved into the informant's cell. We disagree.

In criminal cases, MCR 6.201 governs discovery. The court rule lists mandatory subjects of discovery and requires that, upon request, the prosecutor disclose exculpatory information and various other specified items of evidence. See MCR 6.201(A) and (B). Discovery of non-privileged evidentiary items not addressed in MCR 6.201(A) and (B) is governed by MCR 6.201(I), which provides that "[o]n good cause shown, the court may order modification of the requirements and prohibitions of this rule."

In the present case, defendant does not claim that disclosure of the informant's recorded telephone conversations was required under MCR 6.201(A) or (B). Thus, MCR 6.201(I) applies and defendant is required to show good cause for the requested discovery. Defendant concedes that he has no information concerning the materiality of the requested information. Without showing that the requested telephone calls contain any information relevant to this case, or relevant to the informant's credibility, defendant cannot meet the "good cause" standard of MCR 6.201(I). Accordingly, defendant has failed to show that defense counsel was ineffective for failing to move for discovery of the informant's telephone call. Counsel is not required to make a futile motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

C. Calling Witnesses

Defendant argues, in propria persona, that defense counsel was ineffective for failing to call any witnesses and by preventing defendant from testifying on his own behalf.

Initially, defendant agreed on the record that he had consulted with defense counsel and was waiving his right to testify based on counsel's advice. Defendant also acknowledged that it was his "choice knowingly and voluntarily to not testify in this case." Thus, the record does not support defendant's claim that counsel prevented him from testifying, and further, defendant's on-the-record waiver extinguishes any claim of error in this regard. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

With respect to other witnesses, "[d]ecisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption of sound strategy, defendant must show that counsel's alleged error deprived him of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Here, the parties stipulated that two of defendant's fellow inmates would testify that they learned that the informant needed approximately $600 for restitution and $1,300 for extradition from Florida in order to bond out of jail. On appeal, defendant does not identify any other witnesses who he believes counsel should have called, nor does he explain the substance of their expected testimony. Accordingly, there is no basis for concluding that counsel's failure to call additional witnesses deprived defendant of a substantial defense. Defendant has failed to overcome the presumption of sound trial strategy.

D. Cumulative Effect of Counsel's Errors

Defendant additionally argues that defense counsel was ineffective in his handling or failure to preserve the remaining issues raised on appeal. Defendant argues that, cumulatively, these errors deprived him of a fair trial. For the reasons hereinafter discussed, we conclude that none of defendant's remaining issues have merit. Therefore, there is no cumulative effect warranting a new trial, *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), and, accordingly, defendant's related ineffective assistance of counsel claim must also fail.

II. Other Bad Acts Evidence

Defendant, through both appellate counsel and in propria persona, argues that the admission of evidence that he engaged in other bad acts denied him a fair trial. Defendant preserved his challenge to the evidence of his prior assault against the victim and the attendant conviction for assault with intent to do great bodily harm by objecting to this evidence at trial. However, defendant did not object to the evidence of the alleged acts of vandalism against the victim or the contentious divorce proceedings, so these issues are not preserved.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Unpreserved issues are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MRE 404(b)(1) prohibits the admission of evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith," but does not exclude such evidence if offered for other proper purposes, such as proof of motive or intent. In deciding whether to admit evidence of other bad acts under this rule, a trial court must decide: (1) whether the evidence is being offered for a proper purpose, not to show the defendant's propensity to act in conformance with a given character trait; (2) whether the evidence is relevant to an issue or fact of consequence at trial; (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice; and (4) whether a cautionary instruction is appropriate. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994). "[P]rohibiting the *use* of evidence of specific acts to prove a

person's character to show that the person acted in conformity with character on a particular occasion . . . does not preclude using the evidence for other relevant purposes." *Sabin*, *supra* at 56 (emphasis in the original).

A. Prior Assault

The trial court did not abuse its discretion in admitting evidence of defendant's prior assault on the victim, and of defendant's attendant conviction.

The prior assault and attendant conviction were relevant to the issues of motive and intent, which are proper purposes under MRE 404(b)(1). Although the jury was already aware that defendant was in jail, inasmuch as he was convicted of soliciting another jail inmate, evidence that defendant was in jail because of a conviction relating to the same victim who was the target of the present offense was relevant to explain defendant's motive and intent to solicit someone to kill that particular victim. The evidence of defendant's prior assault against the victim was also relevant to defendant's intent to harm the victim. The issues of motive and intent were contested issues at trial in light of the defense claims that defendant did not wish the victim any harm and that the crime was the informant's idea. Considering the trial court's cautionary instruction, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.[2]

B. Other Bad Acts

The evidence of the contentious divorce proceedings between defendant and the victim, and of the alleged acts of vandalism directed against the victim did not amount to plain error affecting defendant's substantial rights.

The divorce evidence had little tendency to be unfairly prejudicial, but was highly relevant to explain defendant's disdain for the victim, and was particularly relevant to the issue of motive, especially in light of defendant's recorded conversations with the informant in which he frequently expressed how he believed he was treated unfairly in the divorce proceedings. The acts of vandalism against the victim were relevant to explain why she went outside to investigate on the occasion that she was assaulted by defendant. Further, any tendency for unfair prejudice was minimized by the victim's admissions that she never actually observed defendant commit the acts of vandalism at her new house. Further, the admission of this evidence was not plain error under MCL 768.27b(1).

[2] We also note that, although not cited as a basis for the trial court's decision, evidence of domestic violence is admissible under MCL 768.27b(1) in a prosecution for domestic violence. This Court recently held that this statute is constitutional. See *People v Schultz*, ___ Mich App ___; ___ NW2d ___ (Docket No. 272219, issued May 8, 2008), slip op at 1-2, lv pending. Domestic violence is defined as, among other things, attempting to cause physical harm to a former spouse, and engaging in activity that would cause a reasonable person to feel terrorized, frightened, or threatened. See MCL 768.27b(5)(a)(i) and (iv). Solicitation of murder fits these definitions. Therefore, evidence of defendant's prior assault was also admissible under MCL 768.27b(1).

III. Prosecutor's Conduct

Defendant argues that the prosecutor's misconduct deprived him of a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Here, however, because defendant failed to object to the alleged misconduct, he must show a plain error affecting his substantial rights. *Carines*, *supra* at 763-764; *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000).[3]

A. Prior Acts of Vandalism

Defendant argues that the prosecutor improperly accused him of committing prior acts of vandalism against the victim without proof that he was the perpetrator. A prosecutor is free to comment on the evidence, to draw all reasonable inferences from the evidence, and to argue how the evidence relates to the prosecution's theory of the case. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). In this case, it was reasonable to infer from the circumstances surrounding defendant's assault of the victim—e.g., his presence in her yard late at night, his possession of garbage cans, and the presence of yard refuse near the scene of the beating—that defendant was the person who had been dumping yard waste on the victim's property. Accordingly, in arguing that the assault was consistent with the prior acts of vandalism, the prosecutor properly commented on the evidence, drew reasonable inferences from that evidence, and tied it to her theory of the case. Because the prosecutor's argument was not improper, defense counsel was not ineffective for failing to object. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

B. Civic Duty Argument

Defendant also argues that the prosecutor improperly urged the jury to convict him in the name of justice, thereby appealing to its sense of civic duty, and improperly expressed her personal belief in defendant's guilt. We again disagree.

In arguing that defendant was not the victim, and that justice would be served by convicting defendant, the prosecutor did not express her personal opinion. Rather, she properly drew inferences from the evidence introduced at trial, and related those inferences to her theory of the case. The comments concerning justice were a direct and proper response to defendant's demand for justice from the legal system, and his theory that he had been victimized in this case. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001). The prosecutor's strong language was warranted in the performance of her duty as an advocate. *Marji*, *supra* at 538.

[3] Abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Again, because the prosecutor's argument was not improper, defense counsel was not ineffective for failing to make a futile objection. *Kulpinski*, *supra* at 27.

IV. Jury Instructions

Defendant, through both appellate counsel and in propria persona, also argues that various instructional errors deprived him of a fair trial. Because defendant did not object to the trial court's jury instructions, or request any additional or different instructions, we review these claims for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764; *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are reviewed as a whole rather than piecemeal. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

A. Other Bad Acts

Defendant argues that although the trial court gave a cautionary instruction with respect to the evidence of his prior assault and conviction, it erroneously failed to give a cautionary instruction concerning how to consider evidence of other bad acts, such as the acts of vandalism and conduct surrounding the divorce proceedings. Because such an instruction was not requested, there was no plain error in failing to give one. See MRE 105; see also MCL 768.29. Further, there is no indication that the evidence was offered or argued for an improper purpose, so we cannot conclude that defendant's substantial rights were affected, or that defendant was prejudiced by defense counsel's failure to request an instruction.

B. Reasonable Doubt Instruction

Defendant argues, in propria persona, that the trial court erred by failing to instruct the jury on reasonable doubt in accordance with former CJI 3:1:04. Contrary to what defendant argues, the trial court did not substitute CJI2d 4.3, the instruction explaining circumstantial evidence, for a reasonable doubt instruction. Instead, the court instructed the jury on reasonable doubt in accordance with current CJI2d 3.2(3), which adequately conveys the concept of reasonable doubt. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003). Accordingly, there was no error, plain or otherwise, and defense counsel was not ineffective for failing to make a futile objection. See *Kulpinski*, *supra* at 27.

V. Sentencing Guidelines

Defendant argues that the trial court erred in scoring ten points for offense variable (OV) 4 (serious psychological injury requiring professional treatment).

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court thus reviews a trial court's scoring

decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Because defendant did not object to the scoring of the guidelines at sentencing or in an appropriate post-sentencing motion, we review this issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

MCL 777.34(1)(a) instructs a court to score ten points for OV 4 if a victim experiences a serious psychological injury requiring professional treatment. The fact that treatment has not been sought is not conclusive. MCL 777.34(2). The evidence showed that defendant previously assaulted the victim and then, after he was convicted and incarcerated for that assault, solicited someone to kill the victim. The victim indicated that even though defendant was in prison, she still feared for her life. At sentencing, the prosecutor agreed that because defendant was able to solicit someone to kill the victim while he was in jail, she was unable to reassure the victim that she was now safe, or restore the victim's sense of personal security. In light of this evidence, there was no plain error in scoring ten points for OV 4.

Because defendant has failed to establish a scoring error and does not argue that he was sentenced on the basis of inaccurate information, we must affirm defendant's sentence. MCL 769.34(10).

VI. Defendant's Remaining Issues in his Standard 4 Brief

A. Due Process

Defendant argues that the prosecutor violated his right to due process by not playing the September 7, 2006, recording of the informant's conversation with defendant. Defendant also adds that defense counsel was ineffective for not playing the recording himself. We disagree.

Constitutional claims of due process violations are generally reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). But because defendant never raised this issue below, it is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Defendant offers no support for his argument that the prosecutor had a duty to introduce this evidence. Further, there is no factual support for defendant's argument that the recording was exculpatory. On the contrary, Detective Welch testified that the recording was inaudible because of excessive background noise. Moreover, even if the recording showed that defendant did not solicit the informant on September 7, 2006, there was evidence that defendant did so at other times. For these reasons, there is no basis for concluding that the failure to play the recording was either plain error or affected defendant's substantial rights.

Defense counsel apparently had a copy of the first recording and chose not to play it for the jury. In light of the detective's testimony that the conversation on the recording was not audible, defendant has not shown that defense counsel was ineffective for failing to offer it.

B. Right to Counsel

Defendant argues that his Sixth Amendment right to counsel was violated because he was interrogated by a government agent, i.e., the informant, after a court authorized the police to conduct surveillance on him on September 1, 2006. We find no merit to this argument.

On September 1, 2006, the informant entered a conditional guilty plea to a pending charge, but there is no indication that defendant's situation was discussed at that time, or that it played any part in the informant's plea agreement. Indeed, the informant did not first approach the police about defendant until September 4, 2006. Formal proceedings for the solicitation charge were not initiated against defendant until after the informant participated in the recorded conversations with defendant. Thus, at the time of the conversations, defendant's Sixth Amendment right to counsel had not yet attached. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). Accordingly, there was no violation of defendant's Sixth Amendment right to counsel.

C. The Audio Recording

Defendant argues that the tape recording of his conversation with the informant was inadmissible because the speakers were never properly identified, there were numerous inaudible passages, there is a ten-minute gap in the recording which he attributes to tampering, and because the informant received a benefit as a result of his cooperation with the police. Because defense counsel stipulated to the admission of the September 8, 2006, tape recording and accompanying transcript, this issue has been waived. *Riley*, *supra* at 449.

In any event, there is no merit to defendant's argument. As noted by defendant, in *People v Karmey*, 86 Mich App 627, 632; 273 NW2d 503 (1978), this Court held that to establish a foundation for the admissibility of a tape recording, there must be

> (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement. [Internal quotations and citations omitted.]

However, in *People v Berkey*, 437 Mich 40, 48-50, 52; 467 NW2d 6 (1991), our Supreme Court held that under MRE 901, which was adopted after *Karmey* was decided, a foundation may be established by "evidence sufficient to support a finding that the matter in question is what its proponent claims." The Court held that the concerns addressed in the seven-part *Karmey* test go to the weight rather than the admissibility of evidence, and "are matters that should ordinarily be addressed to the finder of fact." *Id*. at 50-52.

Furthermore, even the *Karmey* Court added:

> The fact that a recording may not reproduce an entire conversation, or may be indistinct or inaudible in part, has usually been held not to require its

> exclusion; however, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said. It has been held that unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge. [*Karmey, supra* at 632.]

In the present case, there is no claim that the recording was so inaudible that it was incomprehensible. On the contrary, the recording was transcribed. There is no record support for defendant's claim that the tape contains a ten-minute gap, or that any inaudible portions were so substantial as to render it untrustworthy. Further, contrary to defendant's argument, the speakers were identified at the beginning of the recording and at trial. Finally, there is no indication that defendant received any inducement for making the recording that might render it involuntary or untrustworthy. Thus, even under the *Karmey* standard, defendant has failed to show that the admission of the recording was plain error.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto