

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELISA REDWINE, JR.,

Defendant-Appellant.

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UNPUBLISHED

May 19, 2009

No. 280326

Genesee Circuit Court

LC No. 06-018939-FC

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(1)(a) (premeditated murder), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment for the murder, and two years' imprisonment for the felony-firearm crime. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting other acts evidence under MRE 404(b), and that the trial court also erred in admitting hearsay statements. We disagree.

Generally, this Court reviews for an abuse of discretion decisions whether to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, defendant's unpreserved claims of evidentiary error are reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred, (2) the error was plain, (3) and the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the circuit court proceedings. *Id.*

Defendant's convictions stem from the shooting death of Ronnie Wayne Turberville, who was found dead in his trailer on July 18, 2006. Michael Ashbaker testified that, on the evening of Turberville's killing, defendant approached him and asked him where Turberville was. Although Ashbaker knew that Turberville was sitting on a nearby porch, he told defendant that he did not know where Turberville was. The prosecutor asked Ashbaker why he lied to defendant. Ashbaker answered that defendant once beat up a kid for stealing his car and videotape, and thus, Ashbaker was concerned that defendant would start a fight with Turberville. Defendant contends that Ashbaker's testimony was admitted for the improper purpose of showing defendant's bad character. The prosecution argues, as it did at trial, that the testimony

was admitted for the proper purpose of explaining why Ashbaker lied to defendant, a relevant issue.

MRE 404(b)(1) governs the admission of other acts evidence, and provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

The challenged testimony was offered for the proper purpose of explaining why Ashbaker lied to defendant about Turberville's whereabouts. Evidence explaining why a witness acted the way he did, in a relevant matter, is considered a proper purpose under MRE 404(b). See *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996) (in a criminal sexual conduct case, evidence of the defendant's threats against the victim's mother were admitted for the proper purpose of explaining why the mother left the marital home). The evidence was relevant because it bore on the credibility of a material witness. The prosecution could properly introduce evidence to show that Ashbaker had a legitimate reason for lying to defendant, in order to prevent Ashbaker's credibility from being undermined. Moreover, defendant has not established that this testimony was unfairly prejudicial. Defendant's prior altercation was not particularly egregious, nor was it so similar in nature to the charged offenses, that a jury would likely conclude that because he committed the prior act, he likely committed the charged offenses.

Even assuming that the MRE 404(b) evidence was improperly admitted, defendant fails to demonstrate prejudice. The remaining unchallenged evidence against defendant was strong. Ashbaker testified that defendant came looking for Turberville, shortly before the killing. Defendant's friend, Robert Fritzler, testified that, on the day of the killing, defendant told Fritzler that he needed to "take somebody out," armed himself with a gun that would not leave shell casings, and he and Fritzler rode bicycles to the vicinity of Tuberville's trailer. Fritzler saw defendant walk up to the trailer, heard a gunshot and saw defendant run away from the trailer. Fritzler saw defendant run into his neighbor's house, and come out a few minutes later in different clothing. Defendant stated that he needed to sprinkle pepper on the ground so that dogs could not track his scent. David Pearson, who met defendant while they were both in jail, testified that defendant admitted to shooting Turberville in the back of the head, while he was sleeping, and to throwing the gun in the river. Although defendant testified that he had nothing to do with Turberville's death, the jury was entitled to disbelieve him. Indeed, defendant's credibility was undermined, when another inmate testified that defendant asked him to lie under

oath in order to discredit Fritzler. Considering the totality of the testimony, there is no basis to set aside defendant's conviction, even if the MRE 404(b) evidence was erroneously admitted.

Next, defendant claims that the testimony of two investigating officers, concerning Fritzler's prior consistent statements about what occurred on the day of the killing, constituted inadmissible hearsay. Fritzler's trial testimony was substantially similar to his statements to the officers.

Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is" "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." MRE 801(d)(1).

Here, the declarant, Fritzler, testified at trial, and was subject to cross-examination concerning his statements to the officers. In addition, the challenged testimony was properly offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. In her opening statement, the prosecutor outlined Fritzler's prospective testimony, and emphasized how it would be damaging to defendant. In response, in defendant's opening statement, defense counsel stated that the prosecution's witnesses were not worthy of belief, and that Fritzler changed his story, by initially stating that he knew nothing about the killing, then altering his statement after receiving a plea deal. Later, while cross-examining Fritzler regarding his plea deal, defense counsel stated, "I'm concerned about this witness's motivation to tell the truth. . . . He just said that he was facing mandatory life, and now he's going to do two years." Consequently, the challenged testimony is nonhearsay, pursuant to MRE 801(d)(1), and was properly admitted. Even assuming that the testimony was improperly admitted, defendant cannot show prejudice, because of the strength of the remaining, unchallenged evidence against him. Thus, defendant's claim of evidentiary error fails. Furthermore, defendant's ineffective assistance of counsel claim, which is based entirely on counsel's failure to seek exclusion of the aforementioned evidence, also fails, because the evidence was properly admitted. See *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995) (stating that a failure to pursue a meritless objection does not constitute ineffective assistance of counsel).

Next, defendant argues that the prosecutor engaged in misconduct, when she suggested that defendant's nickname of "Gotti" was associated with the gangster John Gotti. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutorial comments must be read as a whole, and evaluated in light of defense arguments, and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

The prosecutor's references to John Gotti were not baseless, but rather, were grounded on defendant's actual nickname, which other witnesses had referred-to even before defendant took the stand. Defendant's nickname, even absent prosecutorial questioning on the matter, would likely have invoked associations in the jurors' minds with the notorious gangster. The prosecutor's questions provided defendant an opportunity to explain to the jury that his nickname had nothing to do with the gangster, or a gangster-lifestyle, but rather, was given to him for another reason. The prosecutor's questions were not unfair, in that she did not suggest that defendant's nickname was in fact associated with the famous gangster, rather, she merely asked him if that was the case. Defendant answered in the negative, and the prosecutor moved on to a different question. Given the circumstances, the prosecutor's challenged questions did not constitute misconduct. Even assuming that the prosecutor committed misconduct by pursuing such a line of questioning, defendant cannot show prejudice. The untainted evidence against defendant was substantial, and not meaningfully undermined by the prosecutor's questions. Thus, defendant's prosecutorial misconduct claim fails.

Finally, defendant argues that the trial court erred in excluding the testimony of a defense witness on the basis that the witness would assert her Fifth Amendment privilege against self-incrimination. We disagree. Whether the trial court erred in excluding a witness from testifying is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 398; 633 NW2d 376 (2001).

Outside the presence of the jury, defense witness Tatiana Fernandez, defendant's live-in girlfriend, testified that, if called to testify before the jury, she would assert her Fifth Amendment right against self-incrimination, in regard to pending drug charges against her, and any other charges against her. Apparently, the drug charges stemmed from an incident in June 2006. It was also revealed that police found marijuana at the home shared by Fernandez and defendant, on July 18, 2006, the day that defendant was arrested for Turberville's murder. On the basis of a blanket assertion by Fernandez of her Fifth Amendment privilege, however, the trial court, without any analysis or elaboration, excused Fernandez from testifying.

The right against self-incrimination is guaranteed by both the United States Constitution and the Michigan Constitution. *People v Bassage*, 274 Mich App 321, 324; 733 NW2d 398 (2007). A witness may assert the Fifth Amendment right against self-incrimination at any proceeding in which the witness reasonably believes that the information sought, or that is discoverable as a result of the witness's testimony, may lead to subsequent criminal proceedings against him or her. *Id.* at 324-325. The privilege against self-incrimination may only be asserted on a question-by-question basis, to questions that would tend to incriminate the witness, and cannot be asserted as a blanket response to all questions. *People v Dyer*, 425 Mich 572, 578-579; 390 NW2d 645 (1986).

Although Fernandez was entitled to invoke her Fifth Amendment privilege with respect to questions related to the drug charges against her, she could have answered other questions material to defendant's defense, because such answers would not have incriminated her. For example, Fernandez could have testified concerning defendant's whereabouts at the time of the killing; what activities defendant was engaged in during the time of the killing; whether she observed him going out on a bicycle ride; whether she observed him with a gun, etc. . . . Given that defendant had earlier testified that he spent a portion of the day in question with Fernandez and desired to call her as a witness, presumably, Fernandez's answers to these questions would

have been favorable to defendant. Consequently, the trial court erred in excluding Fernandez as a defense witness, on the basis of a blanket assertion of her Fifth Amendment privilege against self-incrimination.

Nevertheless, there was an independent basis to support the exclusion of Fernandez's testimony. Because Fernandez was to be an alibi witness who would testify regarding defendant's whereabouts on the evening of the killing, under MCL 768.20(1), defendant was required to file an alibi notice. However, defendant failed to file an alibi notice. Since defendant was at all times aware of Fernandez's existence, and of the testimony that she could provide, there is nothing in the record that would excuse defendant's failure to list Fernandez as an alibi witness. A trial court may exclude alibi evidence if the statutory notice is not given. *People v McMillan*, 213 Mich App 134, 140; 539 NW2d 553 (1995). Thus, while Fernandez' testimony should not have been precluded by the trial court based solely on a blanket assertion of the Fifth Amendment privilege against self-incrimination, this Court will affirm a correct result even where it is based on incorrect reasoning. *People v Goold*, 241 Mich App 333, 342 n 3; 615 NW2d 794 (2000).

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Kurtis T. Wilder  
/s/ Stephen L. Borrello