

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARA KATLYN JADE,

Defendant-Appellant.

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UNPUBLISHED

June 16, 2009

No. 284271

Oakland Circuit Court

LC No. 2007-218266-FH

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant<sup>1</sup> appeals as of right her jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 5 to 20 years' imprisonment. We affirm.

Defendant's conviction arises out of a stabbing that occurred during a fight with the complainant. At trial, defendant claimed that she acted out of self-defense.

On appeal, defendant argues that the prosecutor engaged in misconduct when he elicited testimony that defendant had other knives and a sword in her apartment, elicited testimony that defendant's name is the same as the name of a weapons expert from the movie Star Wars, and when he elicited testimony regarding defendant's transgender status, which was accompanied by closing argument that also improperly touched on defendant's gender. Defendant additionally argues that prosecutorial misconduct was committed when the prosecutor indicated in closing argument that defendant could not validly argue self-defense if she did anything to cause the attack. Defendant further contends that counsel was ineffective for not objecting to the evidence regarding her transgender status, which was more prejudicial than probative, and for first bringing up the subject himself. According to defendant, counsel was also ineffective for failing to object to a long, unbroken narrative of the complaining witness, for failing to object to the prosecutor's use of leading questions on direct examination of a witness, and for failing to object to a question in which the prosecutor asked whether defendant had a knife fetish. And counsel's

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<sup>1</sup> Given defendant's transgender status, we will refer to defendant as a female herein.

objection to the testimony regarding knives and a sword was too late, such that the damage was already done. Defendant maintains that the prosecutorial misconduct and ineffective assistance of counsel was not harmless. Finally, defendant argues that the trial court erred in allowing evidence of defendant's transgender status, in allowing the introduction of the victim's bloody shirt, and in allowing the victim to lift up his shirt and show the jury his scars.

With respect to the issue regarding defendant's transgender status, defense counsel, during jury voir dire, stated:

We have another issue in this case here. . . . And . . . it's something that you are going to have to consider as to whether you're fair and impartial jurors. Mara Jade was born male. Mara Jade was born Kenneth Ashbaugh. So, there is something called a transition or a transformation as to transgender. I need to know whether the fact that Mara Jade sits there, now that you know what I have explained to you, and you would have heard it during trial, whether that repulses anybody . . . .

[C]an you be fair and impartial and treat Mara Jade the same as you would treat anybody else, whether it be homosexual, heterosexual, transgender, cross-dresser or whatever?

No prospective juror indicated that he or she could not be fair and impartial.

While counsel's remarks occurred prior to the taking of testimony and evidence, we cannot condemn the prosecutor and charge him with misconduct when he elicited evidence on a subject that defendant made known to the jurors in no uncertain terms. The test for prosecutorial misconduct asks whether a defendant was denied a fair and impartial trial, and we review the issue of alleged misconduct case by case, evaluating the prosecutor's remarks in context and in light of the defense's arguments. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). Further, and importantly, "[a] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Id.* at 70.

Evidence of defendant's transgender status was pertinent, where it went to the issue of whether the knife used in the assault was retrieved from defendant's purse or pulled out of defendant's pocket, upon which issue there was conflicting evidence. The prosecution's witnesses, including the victim, testified that defendant went to get the knife out of her purse, suggesting that self-defense did not play a role, while a defense witness testified that defendant pulled the knife directly from a pocket and that defendant "never carries it in her purse." In defense counsel's opening statement, he asserted that the proofs would show that defendant did not have the knife in her purse and that she carried the knife in her pocket. Certainly the prosecutor, in an assault case and one involving a claim of self-defense, had the right to elicit testimony regarding how the events surrounding the incident transpired, including evidence describing from where the weapon was retrieved directly before it was used. Given the theory and testimony that the knife was retrieved from a purse, the prosecution was permitted to also elicit testimony that connected defendant to the purse, which would include evidence of defendant's transgender status, thereby explaining why defendant would have a purse in the first

place. The conflicting evidence on the matter concerning where the knife was located, which had some relevance to the issue of self-defense, provided support for admissibility of the gender testimony, where it could have assisted the jury in resolving the conflict, and the gender evidence could also have had a bearing on witness credibility. The evidence was relevant, and its probative value was not substantially outweighed by the danger of *unfair* prejudice. MRE 401-403. Even were the evidence inadmissible, there was no indication whatsoever of any bad faith on the part of the prosecutor for eliciting the information regarding defendant's transgender status, which had already been made known to the jurors. Accordingly, the prosecutor did not commit misconduct by eliciting the challenged testimony, nor was it improper to refer to the evidence during closing argument. Additionally, because the evidence was admissible, the trial court did not abuse its discretion in allowing its admission. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). We also find that defense counsel was not ineffective for failing to raise a futile objection to the evidence. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Further, counsel was not ineffective for first raising the issue of defendant's transgender status during voir dire. Defendant has failed to overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).<sup>2</sup> Attempting to determine whether any prospective jurors would have difficulty in being fair and impartial because of defendant's transgender status, and first raising the issue as a preemptive move before the prosecutor seized on the subject, was a sound and reasonable approach to take, especially considering that trial evidence on the issue would be properly admissible.

With respect to the evidence of other knives and a sword that were kept in defendant's apartment, we initially question whether the evidence was inadmissible, considering the nature of this case. Regardless, there is no indication in the record that the prosecutor was proceeding in bad faith by following the challenged line of questioning. Further, defense counsel elicited testimony that defendant carried utility knives and had a knife collection. Counsel also conceded at trial, on the record before the jury, that defendant had a knife collection. "Defendant cannot complain of admission of testimony which defendant invited or instigated." *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982). No prejudice, harm, or wrongdoing can be attributed to the prosecutor's actions. MCL 769.26; *Lukity, supra* at 495. We also hold that counsel was not ineffective with respect to any of the issues related to the knives and sword or the so-called "knife fetish," where defendant fails to overcome the strong presumption that counsel's performance constituted sound trial strategy. The fact that defendant collected, was interested in, and generally carried knives would provide an explanation as to why defendant

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<sup>2</sup> To justify reversal on the basis of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense, which means that there existed a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra* at 599-600.

would have been carrying a knife on her person (defendant's theory) at the time of the incident, which in turn lent some support for the argument that she acted in self-defense.

With respect to the issue concerning the origin of defendant's name and the Star Wars reference, we fail to see how defendant was in any way prejudiced; any error was harmless and did not affect the outcome of the proceedings. MCL 769.26; *Lukity, supra* at 495. Moreover, the trial court sustained an objection to the questioning and later instructed the jury to disregard any excluded evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

With respect to the prosecutor's closing argument relative to whether defendant could justifiably allege self-defense under the circumstances, supposedly misstating the law by implication, there is no claim or argument that the court improperly instructed the jury on the law of self-defense. Therefore, assuming any misstatement of law by the prosecutor, and presuming that the jury followed its instruction, we cannot conclude that plain error affecting defendant's substantial rights occurred in regard to this unpreserved argument. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We would also note that, while defendant argues that the prosecutor misstated the law, defendant cites no authority in regard to the applicable law.

With respect to the claim of ineffective assistance of counsel for failure to object to the long, unbroken narrative of the complaining witness, the prosecutor asked the victim to "[w]alk us through the night," at which point the victim testified at length and without interruption about all that occurred on the night of the incident. First, "[n]othing in [MRE 611(a)] specifically precludes testimony because of its narrative form." *People v Wilson*, 119 Mich App 606, 617; 326 NW2d 576 (1982). Regardless, we can reasonably imagine a potential benefit to defendant in allowing the complainant to ramble endlessly without direction or guidance from the prosecutor, giving defense counsel fodder for purposes of cross-examination. Defendant has failed to overcome the strong presumption that counsel's performance constituted sound trial strategy.

With respect to the claims of ineffective assistance of counsel for failure to object to leading questions, there is no indication or argument of prejudice occurring because of the leading questions, nor was there a pattern of eliciting inadmissible evidence. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Accordingly, the requisite prejudice element of an ineffective assistance claim has not been established.

Finally, with respect to the alleged errors by the trial court in admitting the victim's bloody shirt and allowing the victim to show the jury his injuries, the issue concerning the shirt was waived, *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), and the issue concerning the display of the victim's injuries was forfeited, making it subject to the plain-error test, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Regardless, the evidence was admissible to show the extent and severity of the victim's injuries, which could be considered by the jury, consistent with the court's instructions, in determining whether defendant had the requisite intent to cause great bodily harm. See *People v Mills*, 450 Mich 61, 69-71; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) (all elements of an offense are at issue during

trial even if not disputed and evidence illustrating the nature and extent of injuries is admissible to show intent if intent is an element).<sup>3</sup>

Affirmed.

/s/ William B. Murphy  
/s/ David H. Sawyer  
/s/ Christopher M. Murray

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<sup>3</sup> Given our rulings above, defendant's argument that the cumulative effect of the alleged errors justifies reversal is rejected; reversal is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).