

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ALLEN DAWSON,

Defendant-Appellant.

UNPUBLISHED

July 1, 2010

No. 289931

Kent Circuit Court

LC No. 08-003462-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), arising from the strangulation death of his wife. He was sentenced to life imprisonment. He appeals as of right. We affirm.

I. PRIOR BAD ACTS EVIDENCE

Defendant first argues that reversal is required because evidence of his past abuse and inappropriate treatment of the victim was improperly admitted at trial, contrary to MRE 404(b)(1).

The evidence in question consisted principally of (1) the victim's statements to others describing or referring to marital discord, defendant's controlling manner and abusive conduct, and the victim's desire to obtain a divorce, and (2) defendant's statements concerning these same matters. The trial court addressed the admissibility of the evidence at a pretrial hearing, at which time the question of admissibility focused mainly on MRE 803(3), the hearsay exception for statements of a declarant's then existing state of mind, and MRE 801(d)(2), which provides that statements of a party-opponent are not hearsay. The trial court determined that the victim's statements were admissible under MRE 803(3), and that defendant's statements were admissible under MRE 801(d)(2). The question whether the evidence might be subject to exclusion under MRE 404(b)(1) was not addressed.¹

¹ We note that the trial court separately addressed the admissibility of evidence of defendant's abuse of his former wife under MRE 404(b)(1). That was the only evidence that was analyzed
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On appeal, defendant does not challenge the trial court's determinations that the statements in question qualified for admission under MRE 803(3) and MRE 801(d)(2). Rather, he argues that the evidence, to the extent it also referred to his prior bad or wrongful acts against the victim, should have been excluded under MRE 404(b)(1). An objection on one ground is generally insufficient to preserve an appellate attack on a different ground. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Because neither defendant nor the trial court addressed the admissibility of the evidence under MRE 404(b)(1) during the pretrial hearing, and defendant did not thereafter object to the evidence on this ground at trial, we question whether defendant properly preserved this issue below. Plaintiff, however, asserts that the issue is preserved. In light of plaintiff's concession that the issue is preserved, we will review the issue in that context.

This Court reviews for an abuse of discretion a trial court's decision to admit evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court's "decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

MRE 404(b)(1) provides that "[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," but is "admissible for other proper purposes, such as proof of motive, . . . [or] intent[.]" To be admissible under MRE 404(b)(1), evidence of a defendant's other bad acts (1) must be offered for a proper purpose, (2) 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).

Some of the evidence defendant challenges, e.g., the victim's statements regarding her perceptions and future intent, does not involve evidence of defendant's prior "crimes, wrongs, or acts." To the extent the evidence does not relate to defendant's conduct, MRE 404(b)(1) is not implicated. To the extent the remaining evidence does implicate MRE 404(b)(1), we conclude that it was properly admitted for permissible noncharacter purposes.

At trial, witnesses testified: (1) that the victim referred to defendant by unseemly names, reported that defendant did the same, and described defendant's efforts to control her; and (2) that they observed bruises on the victim, inferring that defendant caused the marks, and that they observed or heard defendant treat the victim in a controlling manner. To the extent such testimony can be understood as referring to prior bad or wrongful acts by defendant, it is evidence of marital discord or control, which is relevant to show a motive for murder or as circumstantial evidence of premeditation and deliberation. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). The evidence was also probative of the victim's intent to pursue a divorce, which was also relevant to the issue of motive. Motive and intent are proper purposes for admitting prior bad acts evidence. MRE 404(b)(1). Thus, the evidence was relevant to permissible noncharacter purposes.

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under MRE 404(b)(1), and the court agreed that the evidence should be excluded under that rule. The admissibility of that evidence is not at issue on appeal.

Further, we disagree with defendant's argument that the evidence was more prejudicial than probative. Relevant evidence may be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403 is not intended to exclude "damaging" evidence, as any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Instead, it "is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *Id.* (emphasis in original). Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury" or "it would be inequitable to allow the proponent of the evidence to use it." *Id.* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Because the evidence against defendant was circumstantial, evidence of motive was highly relevant. *Fisher*, 449 Mich at 453. In addition, as defendant acknowledges, one of the prosecution's theories at trial was that defendant killed the victim to prevent her from divorcing him. Evidence was presented that defendant had previously been through a costly divorce during which he lost primary custody of his children, and that he stood to lose custody of his other son and incur new litigation costs if the victim decided to divorce him. This evidence was relevant to show that defendant had a motive to kill the victim to avoid the consequences of a divorce. But without the evidence of defendant's controlling manner and treatment of the victim, factors that allegedly led the victim to want a divorce, the jury would not have been able to fully comprehend the victim's circumstances to evaluate whether there was any reason to believe that the victim might be serious about pursuing a divorce, or whether she had reason to do so. "The purpose of admitting relevant evidence is to provide the trier of fact with as much useful information as possible." *Id.* at 452. We conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Therefore, MRE 404(b) did not bar the challenged evidence.

Defendant also argues that even if the evidence was admissible under MRE 404(b)(1), the prosecutor improperly urged the jury to consider the evidence for improper character purposes during his closing and rebuttal arguments by repeatedly commenting that defendant killed the victim because it was "in his nature" and that was "the kind of guy he is." Because defendant did not object to the prosecutor's remarks at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Error requiring reversal will not be found where a curative instruction could have alleviated any prejudicial effect arising from a prosecutor's remarks. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

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). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). 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. *Brown*, 279 Mich App at 135.

Viewing the challenged remarks in context, the record discloses that the prosecutor was arguing from the evidence, and reasonable inferences arising from the evidence, that defendant had a motive and intent to kill the victim based on marital discord caused in part by his attempts

to control her. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Unger*, 278 Mich App at 236. The prosecutor's remarks were also responsive to defense arguments and evidence suggesting that the victim loved defendant and that defendant was a committed husband. Defendant has not shown that the prosecutor's remarks were plain error. Furthermore, to the extent that some of the prosecutor's remarks could be viewed as referring to the other acts evidence for an improper character purpose, a cautionary instruction could have eliminated any perceived prejudice upon timely objection. Therefore, the prosecutor's remarks do not warrant reversal.

II. PSYCHOLOGICAL TESTING

Defendant next argues that it was improper to admit the test results of the Millon Clinical Multiaxial Inventory-III (MCMI) and Minnesota Multi-Phasic Personality Inventory-II (MMPI) tests, which suggested that he was narcissistic and schizophrenic, because the tests are not reliable under MRE 702. Although defendant objected to the test results at trial on the grounds that they were irrelevant under MRE 401, and unduly prejudicial under MRE 403, he did not object on the ground that they were unreliable under MRE 702. Therefore, this issue is unpreserved. *Kimble*, 470 Mich at 309. Thus, we review the issue for plain error affecting defendant's substantial rights. *Brown*, 279 Mich App at 134.

Defendant's argument is based on a misunderstanding of this Court's decision in *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007). In that case, a sexual assault case, the defendant was administered the MMPI, MCMI, and Rorschach tests. *Id.* at 92. As a result of the expert's interview with the defendant and his interpretation of the tests results, the expert "opined that defendant did not fit the profile of a sex offender." *Id.* at 93. However, this Court did not find that the tests were too generalized to be reliable under MRE 702.² On the contrary, it found that "defendant laid a foundation of scientific data and information presented through Barclay's testimony and exhibits supporting the general validity and acceptance of the psychological tests employed by Barclay, the manner of administration, and their interpretation." *Id.* at 95. Rather, it was the use of the psychological tests to develop a sex-offender profile that this Court found was not reliable. *Id.* at 94-95. Defendant does not present any other basis for challenging the reliability of the MMPI and MCMI test results. Accordingly, a plain error has not been shown.

² MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

III. RIGHT TO PRESENT A DEFENSE

Lastly, defendant argues that his constitutional right to present a defense was violated when the trial court excluded evidence of the contents of email communications that were offered to show the victim's "kinky side." Although defendant argued for the admission of this evidence, he never argued that its exclusion violated his constitutional right to present a defense. Therefore, defendant's constitutional argument is unpreserved. Thus, we review the issue for plain error affecting defendant's substantial rights. *Brown*, 279 Mich App at 134.

A criminal defendant's constitutional right to present evidence in his defense is not absolute and must accommodate other legitimate interests. *Unger*, 278 Mich App at 250, citing *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998). States have the power to establish criminal trial rules and procedures, including broad latitude to establish rules excluding evidence. *Unger*, 278 Mich App at 250, citing *Scheffer*, 523 US at 308, and *Chambers v Mississippi*, 410 US 284, 302-303; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Such rules do not abridge a defendant's right to present a defense if they are not arbitrary or disproportionate to the purposes they are designed to serve. *Unger*, 278 Mich App at 250, citing *Scheffer*, 523 US at 308.

The trial court excluded the email communications as inadmissible hearsay. Defendant does not argue that the evidence was not hearsay. The hearsay rules were designed to ensure that evidence is trustworthy. Each categorical exception "reflects instances in which courts have historically recognized that the required trustworthiness is present." *Katt*, 468 Mich at 289. The rules preserve the integrity of criminal trials. Thus, it cannot be said that the evidentiary rules prohibiting hearsay are arbitrary or disproportionate to the purpose they were designed to serve.

Furthermore, defendant was not prohibited from presenting evidence of the victim's "kinky side." He was permitted to present equivalent evidence through other means. Accordingly, there was no plain error.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck