STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 3, 2010
v	No. 290391 Ingham Circuit Court
PARRISH LEMONTE ROBINSON, Defendant-Appellant.	LC No. 08-000591-FH

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), domestic assault (third offense), MCL 750.81(4), and interfering with an electronic communication device, MCL 750.540(5)(a).[1] Defendant was sentenced as a third habitual offender, MCL 769.11, to ten to forty years' imprisonment for the home invasion conviction, and to time served for the domestic assault and interference with an electronic communication device convictions. We affirm in part, reverse in part, and remand for further proceedings.

The complainant was defendant's former girlfriend. She had obtained a personal protection order against defendant and was resisting his attempts to contact her. On the date of the offense, defendant had his cousin's daughter knock on the complainant's door, then entered when the latter opened the door for the girl. The child waited outside while defendant entered the complainant's house. The complainant testified that defendant forcibly grabbed her by the neck, tried to penetrate her digitally, and destroyed her cell phone. The child testified that defendant was inside the house for a short time period, after which both he and the complainant left the house in a state of some agitation; with the complainant asserting that defendant should pay for the phone he had destroyed. A responding police officer observed red marks on the complainant's stomach area and neck, and some blood on the latter.

The complainant had a prior conviction for falsely reporting a felony, MCL 750.411a(1)(b). She was convicted of that offense when she had her father cut the word "snitch"

[1] Defendant was acquitted of an additional charge of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g.

into her back and then falsely told the police her then-boyfriend inflicted the injury. Before trial, the prosecutor acknowledged that the complainant's earlier conviction was admissible for purposes of impeachment under MRE 609, but asked that defendant not be permitted to elicit the facts underlying that conviction. The trial court expressed its agreement with the prosecutor's position and defense counsel acquiesced in the court's decision without further argument.

At a posttrial *Ginther*[2] hearing, defense counsel testified that he knew from experience with the judge in question that he would not be permitted to explore the facts underlying the complainant's prior conviction, under MRE 404(b) or otherwise, so he elected not to pursue the matter.

On appeal, defendant contends that the trial court erroneously precluded him from presenting evidence of the facts underlying the complainant's prior conviction. Defendant alternatively argues that defense counsel was ineffective to the extent that he failed to sufficiently preserve that issue below. We conclude that because the issue in question was raised before and decided by the trial court on the record, the issue was preserved despite defense counsel's lack of argument. In actions tried before the court, "No exception need be taken to a finding or decision." MCR 2.517(A)(7). "The purpose of appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate its prejudice, or at least create a record of the error and its prejudice." *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). In this case, the prosecutor moved to limit the use of the complainant's conviction, and the trial court firmly decided the matter in the prosecution's favor. Although defense counsel neither himself suggested that the use of the evidence should be so limited, nor otherwise expressed agreement with the trial court's decision in the matter, neither did counsel argue the point, having seen the futility. But a decision was made, and a record of it created. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989). Accordingly, the claim of ineffective assistance of counsel predicated on counsel's failure to preserve this issue must fail.

We next address the merits of the trial court's decision. This Court reviews a trial court's decision whether to admit or exclude evidence of other bad acts for an abuse of discretion. *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). "A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *Id.*

Witness credibility is always at issue, and may be attacked on cross-examination. See MRE 611(c). MRE 609 authorizes the introduction of evidence of a crime containing an element of dishonesty or false statement for the purposes of impeaching a witness. That rule is the cited exception to the prohibition of MRE 608(b) of introducing extrinsic evidence to prove specific instances of conduct of a witness for purposes of attacking credibility. The latter otherwise permits inquiry into specific instances of conduct that are probative of truthfulness on cross-examination. Construing those companion rules in harmony with each other[3] means that a party

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[3] See *People v Pfaffle*, 246 Mich App 282, 296; 632 NW2d 162 (2001); *Rafferty v Markovitz*, (continued…)

may cross-examine a witness with specific instances of their conduct, but may not introduce extrinsic evidence of that conduct other than conviction of a crime. Accordingly, in this case, had the complainant denied that she had been convicted of falsely reporting a felony; the defense would have been entitled to rebut that denial with extrinsic evidence of the conviction. Defense counsel would also be free to cross-examine the complainant about the underlying facts of that conviction, but counsel would have to accept her responses without resort to extrinsic evidence.

But also coming into play is MRE 404(b)(1), which provides that evidence of other bad acts is not admissible to prove a person's character in order to show behavior consistent with those other wrongs, but that such conduct may be admissible for other purposes such as proof of "scheme, plan or system in doing an act . . . ." Although the rule is most often invoked in connection with criminal defendants, it also applies to witnesses. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991).

In this case, the trial court concluded after the *Ginther* hearing "although there are some similarities between the facts of that incident and the instant case, they are not enough to articulate a 'scheme, plan, or system in doing an act.'" We disagree. Our Supreme Court has clarified that "evidence of similar misconduct is logically relevant 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). The present situation does not concern earlier acts and a current charge, but rather earlier witness misconduct and a current credibility challenge. Given that the complainant was the only witness to describe what occurred between herself and defendant inside her house at the time in question, evidence that she had previously inflicted physical injury on herself to bring police pressure to bear on an old boyfriend or his family does relate to the defense theory of false accusations in this case. That the earlier event involved the witness arranging for another to injure her, while the defense implication in this case is that she hastily created injuries in order to exaggerate to the police the extent of defendant's aggression, does not prevent the earlier incident and current theory of fabrication from having sufficient commonality to constitute a common plan, scheme, or system.

It is significant that the jury elected to find defendant not guilty of the only charge for which there was no evidence to corroborate the complainant's account—assault with intent to commit criminal sexual conduct involving penetration. The testimony of defendant's cousin's daughter corroborated the complainant's account of defendant entering her house without permission, and of destroying her cell phone while within, but the only corroboration of the allegations of physical assault on that occasion was the redness the police discovered on the complainant's stomach area and neck, and some blood on the latter.

Although defendant frames this issue in terms of the constitutional right to present a defense, the crux of the matter is a dispute over an evidentiary ruling relating to impeachment of the complaining witness over a collateral matter. Error related to the admission of evidence that does not implicate a specific constitutional guarantee or right is nonconstitutional in nature. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). A defendant pressing a

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461 Mich 265, 270; 602 NW2d 367 (1999).

preserved claim of nonconstitutional error bears the burden of showing that it is more probable than not that the error affected the outcome. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

In this case, especially considering that the jury apparently retained a reasonable doubt about the only charge in connection with which there was no evidence but for the complainant's account, we conclude that the jury might also have retained a reasonable doubt regarding the allegations of assault had it been made aware that the complainant previously manufactured an injury in an effort to pursue a police complaint against an old boyfriend.

First-degree home invasion was presented to the jury on the theory that defendant entered the complainant's home without permission and assaulted her. The limitation on defendant's ability to rebut the evidence of an assault undermines that conviction, along with that of domestic assault. The Felony Information listed the first-degree home invasion as premised solely on "domestic violence," which comprised count three of the charges under MCL 750.81. The prosecutor indicated in opening statements that the home invasion was premised on the occurrence of an assault. When instructing the jury the trial court did not reference, in accordance with the statutory language of MCL 750.110a(2), that first-degree home invasion can be found if the jury determines that after entering a dwelling without permission the defendant committed either "a felony, larceny or assault." Instead, the trial court specifically instructed the jury that it need only find that defendant entered without permission, that another person was present in the dwelling and that while in the home defendant "committed the crime of an assault." Given the narrow language and specificity of the jury's instruction, it would not be proper to permit the home invasion conviction to stand without the assault conviction.

But whether an assault occurred does not impinge on a determination of whether defendant destroyed the complainant's cell phone. Accordingly, we affirm defendant's conviction of interference with a communication device, but vacate his convictions and sentences for first-degree home invasion and domestic assault. The prosecutor is at liberty to retry the latter two charges, or alternatively, in the case of home invasion, to move the trial court to replace the here-vacated conviction with the necessarily included lesser offense of entering without permission, MCL 750.115(1), and resentence defendant accordingly.[4]

We additionally take this opportunity to correct an irregularity in the judgment of sentence. The original judgment of sentence, dated January 15, 2009, incorrectly indicated that defendant's convictions resulted from a guilty plea, and incorrectly identified the sentencing date as December 5, 2008. An amended judgment of sentence, dated February 5, 2009, corrected the former error, but retained the latter irregularity. A second amended judgment of sentence, dated March 17, 2009, showed that defendant was sentenced as a third habitual offender and correctly identified the sentencing date as January 14, 2009, but reverted to indicating that defendant was convicted by guilty plea. On remand, the trial court should issue a new judgment of sentence that is accurate in all of these particulars.

[4] See *People v Silver*, 466 Mich 386; 646 NW2d 150 (2002).

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis