STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2010
v	No. 290918 Oakland Circuit Court
EDWARD ALBERT STENBERG, Defendant-Appellant.	LC No. 2007-217760-FC

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to life imprisonment for the first-degree murder conviction, 5 to 20 years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for each of the felony-firearm convictions. We affirm.

A. VICTIM'S PRIOR STATEMENTS TO NEIGHBOR

Defendant claims that the trial court abused its direction when it admitted the out-of-court statements of the victim, Laura Stenberg. We disagree.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant argued that Laura's statement to her neighbor violated defendant's right to confrontation but did not object on any other ground. Accordingly, only the confrontation issue is preserved.

Preserved issues of whether evidence was admissible are reviewed for a clear abuse of discretion by the trial court. *Id.* at 113. "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Unpreserved issues, however, are reviewed for plain error affecting substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Furthermore, reversal for unpreserved

matters is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

Defendant's arguments relying on MRE 404(b) are immaterial. Normally, MRE 404(b) prohibits the admission of evidence of "other crimes, wrongs, or acts [when they are used] to prove the character of a person in order to show action in conformity therewith." However, the Michigan Legislature enacted MCL 768.27b, which provides the following:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

Thus, MCL 768.27b allows for what previously would have been inadmissible propensity evidence in domestic violence cases. See *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). Thus, defendant's arguments based on MRE 404(b) have no bearing on this issue.

Here, the prosecution elicited testimony from the neighbor, where he recounted a statement that Laura made to him in September 2005. In that statement, Laura said that defendant had assaulted her with a blackjack and tried to suffocate her with a pillow. Thus, the activity described in the statement clearly qualified as domestic violence and was admissible as long as it was relevant and did not run afoul of MRE 403. The prosecution offered the evidence to show that defendant had a propensity to assault Laura. This is an appropriate usage under MCL 768.27b.

However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Defendant's assertion that the evidence was "highly prejudicial" is inadequate. *All* evidence is prejudicial or damaging to one side or the other at trial. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Only *unfairly* prejudicial evidence is covered by this aspect of MRE 403. *Id.* "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, in this unpreserved issue, defendant failed to show how the evidence was given undue or preemptive weight by the jury. Of course, the statement was prejudicial to defendant, but defendant failed to show how it was *unfairly* prejudicial.

Defendant next argues that the statement did not qualify as an excited utterance. We disagree. MRE 803(2) provides an "excited utterance" exception to the bar on hearsay: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." There are two primary requirements for a statement to be admissible under the excited utterance exception: "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). "It is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Id.* at 551. Thus, defendant's sole reliance on there being no indication of how much time elapsed between

the assault and Laura's conversation with her neighbor is misplaced. While the record does not indicate how much time elapsed, the record did establish that Laura appeared at Edwards's front door, looking disheveled, shaking, and in shock. Thus, there was evidence to support a finding that Laura witnessed a startling event (the assault) and her statement to Edwards was made while she was still under the excitement caused by that event. Accordingly, defendant failed to establish plain error.

Therefore, defendant's unpreserved arguments, that the statement was irrelevant, violated MRE 403, and did not qualify as an excited utterance under MRE 803(2), fail.

Defendant next claims that regardless of the statement's admissibility pursuant to the rules of evidence, it was not admissible because its admission would violate defendant's right of confrontation. We disagree.

The Sixth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI; *People v Buie*, 285 Mich App 401, 407-408; 775 NW2d 817 (2009). The Confrontation Clause applies, not only to in-court testimony, but also to out-of-court statements introduced at trial. *Crawford v Washington*, 541 US 36, 50-51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Even then, only out-of court statements that are *testimonial* implicate the Confrontation Clause. *Id.* at 50-52; *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008). Furthermore, the Confrontation Clause bars the admission of these out-of-court testimonial statements only when the declarant is unavailable to testify and where defendant did not have a prior opportunity to cross-examine the declarant. *Crawford*, 541 US at 59, 68.

The *Crawford* Court "le[ft] for another day," a comprehensive definition of "testimonial." *Id.* at 68. But it did mention that testimonial statements would include, at a minimum, police interrogations and prior testimony from a preliminary hearing, a grand jury, or a trial. *Id.* The Court explained that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. The Court later, while addressing only "police interrogations," determined that not all statements during police interrogations were testimonial. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006); *Taylor*, 482 Mich at 377-378. Statements made during police interrogations are testimonial when made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use at a later trial. *Davis*, 547 US at 822; *Taylor*, 482 Mich at 377-378.

Here, the statements at issue are the ones Laura gave to her neighbor, describing the assault. First, it is obvious that the circumstances surrounding this statement vastly differ from those mentioned in *Crawford*. The statements do not involve police interrogation or testimony from any prior proceeding. Second, even if one applies the police interrogation test described in *Davis*, it is apparent that an objective witness would not reasonably believe that her statements to a neighbor would be available for use at a later trial. In fact, the United States Supreme Court stated, in dicta, that statements to "friends and neighbors about abuse and intimidation" are nontestimonial and do not implicate the Confrontation Clause. *Giles v California*, ___ US ___; 128 S Ct 2678, 2692-2693; 171 L Ed 2d 488 (2008). Because Laura's statements to her neighbor were permissible under MCL 768.27b, qualified as an excited utterance exception to hearsay,

and were not testimonial, the trial court did not err when it admitted the statements, and defendant's claim fails.

B. EVIDENCE OF THREAT/ADMISSION AT PRELIMINARY EXAMINATION

Defendant argues that the trial court erred when it admitted evidence of an alleged threat defendant made at his preliminary examination. We disagree.

Evidence was introduced that, before he sat down at the defense table at his preliminary examination, defendant made a gun shape with his hands, looked at Sky McCann, the girlfriend of the victim's son, swore at her and told her "you're next." Three different witnesses, who were seated amongst the first two rows at the preliminary examination, testified that they saw this threatening behavior.

Defendant argues that the evidence was inadmissible on MRE 404(b) grounds. MRE 404(b) bars the admission of "other acts" evidence when used to prove a defendant's character or a defendant's propensity to commit a crime. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004). However, the evidence was not admitted to simply show defendant's character or to show that he acted in conformity with this act. Here, defendant's actions constituted an admission of past conduct. "Admissions by a party are specifically excluded from hearsay and, thus, are admissible as both impeachment and substantive evidence under MRE 801(d)(2)." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Defendant's threats could have been interpreted as an admission that he previously shot someone, namely Laura. Thus, it was for a jury to determine how much weight to give this admission and the credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). If the jury believed that defendant was admitting to previously killing Laura, then obviously it was extremely prejudicial to defendant. However, this prejudice is not *unfair*. It is defendant's own admissions regarding his prior conduct, for which he was on trial. Accordingly, because the evidence was relevant and not unfairly prejudicial, defendant was not denied a fair trial, and his claim fails.

C. COUNSEL'S FAILURE TO REQUEST A CHANGE IN VENUE

Defendant argues that his trial counsel's failure to request a change in venue constituted ineffective assistance. We disagree. Defendant did not preserve this issue for appeal because he did not move for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Unpreserved issues of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that because of the highly prejudicial pretrial publicity, his defense counsel should have moved for a change in venue. Criminal defendants, generally, must be tried in the county where the crime was committed. *Unger*, 278 Mich App at 253. However, if pretrial media coverage and community interest cause actual prejudice against defendant, then a change in venue is appropriate in order to safeguard defendant's right to a trial by a panel of impartial, indifferent jurors. See *id.* at 254.

Defendant failed to show how the community, let alone a single juror, was actually biased against defendant. Therefore, the performance of his attorney did not fall "below an objective standard of reasonableness."

Also, to the extent that defendant argues that the trial court erred by not changing the venue on its own initiative, this argument is without merit. Trial courts are under no obligation to change sua sponte the venue of a criminal defendant's trial to another county. *Unger*, 278 Mich App at 254 n 12. In fact, MCL 762.7 clearly states that a trial court may change venue in a criminal case only "upon good cause shown by either party." *Id.*

D. EVIDENCE SEIZED FROM DEFENDANT AT TIME OF ARREST

Defendant argues that he was denied a fair trial when the trial court admitted evidence of him possessing other weapons and condoms at the time he was arrested. We disagree. Unpreserved constitutional and nonconstitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

When defendant was arrested in Florida, the following items were found in his possession: a loaded 9 mm stainless steel handgun; a black stun gun; several knifes/switchblades; a bag of condoms; some clothing; a loaded, small, black .22 handgun; and some medication. Defendant maintains that the only admissible item was the .22 handgun.

Relevant evidence is admissible and irrelevant evidence is not admissible. MRE 402. Relevant evidence is evidence that has *any tendency* to make the existence of any material fact or issue at trial more or less probable than it would be without the evidence. MRE 401; *Knox*, 469 Mich at 509. The weapons were relevant to show that defendant planned to escape after shooting Laura. Jason Brindley, Laura's son, testified that Laura owned a 9 mm handgun, which was never found in the house at the time of her murder. Thus, the fact that defendant had a 9 mm in his possession makes it more probable than without the evidence that he took the 9 mm

from the home. Likewise, Jason testified that he recognized at least two of the knives that defendant had in his possession as knives that used to be present in the house. The fact that defendant was found in Florida with these weapons, that were known to exist in the Waterford home, indicates that defendant either premeditated this murder and escape by prepacking these weapons or, in his spontaneous decision to escape after the shooting, consciously decided to take the weapons with him to assist him in his flight. Either way, the evidence was relevant to show that defendant had a guilty state of mind. See *Unger*, 278 Mich App at 226 (evidence that the defendant had packed his belongings in a car before the murder victim's body was found can be considered by a jury as evidence of a guilty state of mind). Likewise, the fact that defendant packed his medications from the Waterford home also shows that he planned to flee the area and, consequently, was admissible. The stun gun was also admissible since Jason testified that he saw defendant with a small, black weapon-like object in his hand when defendant had Laura tied, bound, and handcuffed on the bed. Jason was unable to determine what kind of weapon it was; thus, it could have been the stun gun, which was described as "black." Accordingly, the stun gun was properly admitted. Last, any prejudice introduced by the introduction of the third knife, which no one was able to link to the Waterford house, would have been negligible given the fact that the two knifes, two handguns, and one stun gun were properly admitted.

The relevance of the condoms is less clear, but defendant failed to show how their introduction injected any unfair prejudice into the trial. Accordingly, even if the condoms were irrelevant and not admissible, defendant cannot show how any substantial right was affected, and his evidentiary claim fails.

Similarly, defendant's claim that his defense counsel was ineffective by not objecting to the admission of these items fails. As noted, the bulk of the contested evidence was admissible. Therefore, defense counsel was not ineffective by failing to make a futile objection with respect to that evidence. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008). And with respect to the irrelevant condoms and third knife, defendant failed to show how the result of the proceedings would have been different if these two items were not introduced into evidence. The evidence of defendant's guilt was overwhelming, which included, at a minimum, an eyewitness placing defendant at the scene of the murder trying to restrain a bound, tied, and handcuffed Laura; his flight after the crime; his own admissions to police and to his brother-in-law;[1] his propensity for committing domestic violence; his repeated references to wanting to kill Laura; and being found with a .22 handgun that was consistent with the murder weapon. Therefore, defendant's claim of ineffective assistance of counsel fails.

[1] When defendant was arrested in Florida, an acquaintance he was with started to walk away. When police went to detain her, defendant reportedly said, "That lady is not involved. She knows nothing about me killing my wife." Also, in a conversation defendant had with his brother-in-law, defendant stated, "It just got to the point where I couldn't put up with her anymore"; "I did it myself"; and in response to the brother-in-law saying he was glad defendant killed Laura, defendant responded, "Yep, it was a matter of time."

E. DEFENDANT'S MOTION TO BE "CO-COUNSEL"

Defendant argues in his Standard 4 brief that the trial court abused its discretion when it denied defendant's motion to be named "co-counsel." We disagree. A trial court's decision regarding a modification of a criminal defendant's counsel will not be disturbed absent an abuse of discretion. See *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Criminal defendants have a constitutional right to represent themselves at trial. *Faretta v California*, 422 US 806, 819, 821; 95 S Ct 2525; 45 L Ed 2d 562 (1975). While this right allows for a criminal defendant to represent himself at trial, "a criminal defendant has no constitutional or statutory right to represent himself as co-counsel with his own attorney." *People v Kevorkian*, 248 Mich App 373, 422; 639 NW2d 291 (2001) (citing *United States v Tutino*, 883 F2d 1125, 1141 (CA 2, 1989)). "In other words, a defendant has a constitutional entitlement to represent himself or to be represented by counsel – but not both." *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994).

Here, defendant's request to be co-counsel could not be interpreted as a request to solely represent himself. When asked point blank whether defendant wanted to represent himself or to act as co-counsel, defendant acknowledged that he merely wanted to "help" his primary attorney." Thus, defendant's request cannot be construed as an unequivocal request for self-representation.[2] Accordingly, because there is no right to be named "co-counsel," the trial court did not err when it denied defendant's request.

F. FAILURE TO CALL CERTAIN WITNESSES

Defendant next argues in his Standard 4 brief that the trial court erred when it would not allow certain witnesses to be called. Defendant has abandoned this issue on appeal.

Defendant challenges actions by the trial court when, in his statement of questions presented, he states, "*the court* would not allow witnesses to be called." (Emphasis added). However, defendant abandons this issue on appeal because he did not present this argument in his argument section in his brief. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Instead, defendant devoted his entire argument on how he thought his *defense counsel* should have called these witnesses. Likewise, since defense counsel's performance was not mentioned in the statement of questions presented, as required by MCR 7.212(C)(5), that issue is also waived. *Unger*, 278 Mich App at 262.

[2] One of the necessary elements for a defendant to represent himself at trial is to make an "unequivocal" request. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005).

G. CHALLENGING A WITNESS'S CREDIBILITY

Defendant next argues in his Standard 4 brief that the prosecution's main witness, Jason, was biased and that the prosecution wrongfully withheld evidence. Defendant has abandoned this issue on appeal.

Defendant, in his statement of the questions presented, stated, "WAS THE TESTIMONY OF JASON BRINDLEY BIASED [and presumably inadmissible], AND WAS THE PROSECUTOR HIDING ISSUES THAT WOULD CHALLENGE HIS CREDIBILITY?" Once again, defendant abandons these issues on appeal because he did not argue any of these issues in the argument section of his brief. *Payne*, 285 Mich App at 188. Defendant again focused his argument on how his defense counsel was ineffective by not challenging Jason's credibility in a manner that defendant desired. Failure to enumerate the ineffective assistance of counsel claim in the statement of questions presented constitutes a wavier of that issue as well. *Unger*, 278 Mich App at 262. We note that even if defendant's ineffective assistance of counsel argument was considered, none of the documents that he submitted with his Standard 4 brief, and exclusively relied upon, could be considered since unpreserved challenges of ineffective counsel are limited to the lower court record. *Rodriguez*, 251 Mich App at 38. Accordingly, defendant's claim fails.

H. JAILHOUSE TAPED PHONE CONVERSATION

Defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the admission of a taped phone conversation that involved defendant. We disagree.

Defendant contends that his trial counsel's performance was deficient because he did not move for a *Walker*[3] hearing regarding a taped, jailhouse phone call's admissibility. "[T]he sole purpose of the *Walker* hearing is to determine the fact of voluntariness" with respect to statements made by defendants. *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972); *People v Shelson*, 150 Mich App 718, 724; 389 NW2d 159 (1986). The taped conversation occurred while defendant was jailed in Florida before being transported back to Michigan. The conversation was between defendant and defendant's brother-in-law – not the police. There is absolutely nothing to suggest that defendant's statements to his brother-in-law were anything but voluntary. Defendant never argues that the statements were involuntary. Accordingly, defense counsel's performance, by not requesting a *Walker* hearing, cannot be said to fall below an objective standard of reasonableness under prevailing professional norms, and defendant's claim of ineffective assistance of counsel fails.

Defendant also cursorily argues that the statements were somehow inadmissible because their admission denied him a fair trial and violated his Fifth Amendment rights (presumably against self-incrimination). Defendant does not bother to explain *how* the statements denied him

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

a fair trial or *how* they violated any Constitutional rights. Accordingly, defendant's failure to properly analyze or argue these particular issues, results in defendant's abandonment of these issues on appeal. *Payne*, 285 Mich App at 188. In any event, the statements were clearly admissible as admissions against a party-opponent, pursuant to MRE 801(d)(2).

Affirmed.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens