STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2012
v	No. 300966 Oakland Circuit Court
FREDERICK LEE-IBARAJ RHIMES, Defendant-Appellant.	LC No. 2010-231539 - FH

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 99 months to 40 years' imprisonment for the first-degree home invasion conviction, and two to eight years' imprisonment for the felonious assault conviction. We affirm.

In the early morning hours of June 28, 2009, Dorothy Wyrick was at her apartment with her sister Jennifer, Jennifer's boyfriend, Kyrus Clark, and another male. Defendant, who had a child in common with Dorothy, kicked in the door to the apartment and told everyone to leave the apartment. As Clark was attempting to leave the dwelling, defendant hit him several times in the head with a handgun. Clark passed out from his injuries and Jennifer and Dorothy were able to get out of the apartment and get to a neighbor's home, where Dorothy called the police.

On appeal, defendant first argues that he was denied a fair trial because hearsay statements from Dorothy's preliminary examination testimony were improperly admitted into evidence. We disagree.

A trial court's decision to admit evidence is within its discretion, and will thus "be reversed only where there is an abuse of discretion." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when a trial court's decision falls outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Hearsay is a "'statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *People v Yost*, 278 Mich App 341, 363; 749 NW2d 753 (2008), quoting MRE 801(c). Hearsay is inadmissible unless it falls under an established hearsay exception. MRE 802.

In this case, Dorothy's preliminary examination testimony was offered in an effort to prove the truth of the statements. Thus, it was undisputedly hearsay evidence. However, under the former testimony exception to the hearsay rule, MRE 804(b)(1), the testimony of a witness at another hearing "of the same or a different proceeding" is admissible if the party against whom the testimony is offered had an "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." This Court has explained that testimony given by a witness at a preliminary examination qualifies under MRE 804(b)(1) because, at a preliminary examination, a defendant has a similar motivation and opportunity to cross-examine the declarant. *People v Adams*, 233 Mich App 652, 659; 592 NW2d 794 (1999). The party attempting to use former testimony must also, however, illustrate that the declarant is unavailable at the time of trial.

MRE 804(b) provides that former testimony is "not excluded by the hearsay rule if the declarant is unavailable as a witness." According to MRE 804(a)(3), a declarant is unavailable if he or she "has a lack of memory of the subject matter of the declarant's statement."

In this case, the witness testified at trial that she had testified at the preliminary examination but had no memory of what she testified to there. She also, however, testified that she lacked memory about the actual incident. When responding at trial to the prosecutor's questions concerning the actual incident, the witness testified that she did not remember the following: telling her sister to "make sure" the door was locked, whether defendant was yelling when he entered, what defendant said when he entered, if defendant had a gun, how the door was opened, any damage done to the door, if she hid in the bathroom, calling the police from her neighbor's house, whether defendant had lived with her at that time, seeing blood on anyone, or meeting with the police. When reviewing this long list of what the witness forgot about concerning the incident, it is difficult to discern if she actually remembered anything at all about that day. She certainly forgot every relevant fact, and it is difficult to see how such an overwhelming failure to recall anything about the incident could be characterized as anything but a lack of memory about the subject matter of her statements. See *People v Williams*, 117 Mich App 505, 509-510; 324 NW2d 70 (1982).

Alternatively, the witness's preliminary examination testimony was also admissible under MRE 801(d)(1). MRE 801(d)(1) states that 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 (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition…. [MRE 801(d)(1).]

Here, Dorothy testified at trial and was subject to cross-examination concerning her statement, and her prior statements were given under oath. Thus, the only remaining issue is whether the witness's testimony at trial was inconsistent with her prior statement at the preliminary examination.

This Court has instructed that, "'inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.'" *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999), overruled on

other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006), citing *United States v Dennis*, 625 F2d 782, 795 (CA 8, 1980). In this case, a mere five months passed between the preliminary examination and the trial, but Dorothy allegedly forgot every relevant fact about the incident and about what she testified to at the preliminary examination. This certainly qualifies as an inability to recall, rendering the witness's trial testimony inconsistent with her preliminary examination testimony where she provided sufficiently detailed information. Moreover, considering that Dorothy testified that she maintained contact with defendant and that she did not want to be testifying at trial, her sudden lack of memory may also be attributable to deliberate evasion, amounting to inconsistent statements.

Defendant next claims that the trial court erred in admitting evidence of defendant's previous domestic violence acts under MCL 768.27b because the statute is inapplicable. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

MCL 768.27b states that "in a criminal action in which the defendant is accused of an offense involving domestic violence," evidence of a prior act of defendant's domestic violence "is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403." For purposes of this statute, domestic violence includes an "activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(5)(a)(iv). "Family" or "household member" includes an individual with whom the person resides or resided as well as an individual with whom the person has or has had a child in common. MCL 768.27b(5)(b).

Despite defendant's contention otherwise, the crime charged in this case involved domestic violence. Defendant was accused of invading the home of his ex-girlfriend, with whom he shared a child in common. During the invasion, he brandished a handgun, ordered everyone to leave, and assaulted one of the males with the gun. Dorothy ultimately fled the home and called the police from a neighbor's home. Dorothy's actions suggest that she felt frightened or threatened. The requirements of MCL 768.27b have been met.

Moreover, a plain reading of the statute reveals that it is an objective standard, which applies if a *reasonable person* were to feel terrorized, frightened, intimidated, threatened, harassed, or molested. In this case, kicking down a door at 5:00 a.m. after observing the occupants in the dwelling through the blinds, crashing through that door, holding a gun, cocking a gun, yelling for everyone to leave while using obscenities, hitting a person over the head with a gun until that person passes out, and chasing another person out of the apartment, would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested. Thus, the crime at issue is one involving domestic violence.

Defendant additionally asserts that the evidence was unfairly prejudicial. While all relevant evidence is inherently prejudicial, only unfairly prejudicial evidence should be excluded at trial. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). "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 Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010), citing *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

In this case, evidence of defendant's past domestic violence was highly probative, because it demonstrated defendant's "propensity to commit acts of violence against women who were or had been romantically involved with him," *People v Cameron*, 291 Mich App 599, 604; __NW2d__ (2011). Such evidence was also probative of whether the witnesses at trial, including defendant's alibi witnesses and the witness who lacked any memory of defendant's violence, were providing credible testimony. Moreover, even if we were to conclude that defendant's past domestic violence incidents were improperly admitted under the statute, the admissible evidence against defendant included specific, unimpeached eyewitness testimony. Nothing in the record shows that his convictions somehow hinged on the admission of his past acts of domestic violence, such that any error in their admission would have been harmless.

Additionally, the trial court provided a limiting instruction to the jury in an attempt to limit the prejudicial effect of such evidence, stating that the jurors had to first conclude that the prior acts of domestic violence occurred before they could even consider it in their decision. Juries are presumed to follow their instructions and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Defendant next claims that he was denied a fair trial because the prosecutor failed to produce a res gestae witness at trial. We disagree.

While defendant cites numerous cases relating to the prosecutor's obligation to produce a res gestae witness pursuant to *People v Pearson*, 404 Mich 698; 273 NW2d 856 (1979), this Court held, in *People v* Cook, 266 Mich App 290, 295; 702 NW2d 613 (2005) that *Pearson* is no longer good law. On remand from the Michigan Supreme Court in *Cook*, this Court was to decide whether the holding in *Pearson*, "that a post-judgment evidentiary hearing is required when a prosecutor fails to produce an endorsed *res gestae* witness, remains good law in light of the Legislature's amendment of MCL 767.40a." *People v Cook*, 469 Mich 905; 669 NW2d 816 (2003). This Court recognized that it was no longer a prosecutor's required duty to produce all res gestae witnesses. *Cook*, 266 Mich App at 294-295. Instead, a prosecutor only has to "notify a defendant of all *known* res gestae witnesses and all witnesses that the prosecution *intends to produce*." *Id.* at 295 (emphasis in original). But, a prosecutor may have "to provide reasonable assistance in locating witnesses whose presence defendant specifically requests [and] a hearing of the type described by our Supreme Court in *Pearson* might be appropriate if the prosecution is found to have breached this duty." *Id.* at 296, n 7.

In this case, the prosecutor provided notice of the res gestae witness, Kyrus Clark, by listing him on the information. The prosecutor did not, however, include Clark on its list of those witnesses it intended to call to testify at trial. Furthermore, there is no indication that

defendant requested the prosecutor's help in producing Clark. Therefore, the prosecutor was under no obligation to locate Clark or produce him at trial.

Defendant finally asserts that he received ineffective assistance of counsel because counsel failed to find Clark and call him to testify. Because defendant did not preserve this issue for appeal by moving for a new trial in the lower court or requesting a *Ginther*[1] hearing, we review this issue for mistakes apparent on the record. *People v Davis*, 248 Mich App 655, 660; 649 NW2d 94 (2002).

To prove a claim of ineffective assistance of counsel, defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, "the defendant must show that the deficient performance prejudiced the defense," which "requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687. This second prong can be understood as asking whether "there was a reasonable probability that the outcome of the trial would have been different" had defense counsel adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Generally, "a failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009), citing *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). A defendant can establish that the failure to call a witness to testify is ineffective assistance of counsel, however, if he shows "that he made a good-faith effort to avail himself of the right" to present a particular defense "and that the defense of which he was deprived was substantial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.*

In this case, there is no evidence on the record to suggest that Clark would have been a helpful witness to defendant or would have provided defendant with some type of defense. The evidence on the record suggests that defendant violently struck Clark on the head repeatedly, until he passed out and bled profusely from the head. Clark's medical records showed, consistent with the testimony, that he was admitted to the hospital with a head injury after being assaulted with a pistol at his girlfriend's sister's house. There was no evidence on the record indicating that, despite the attack, Clark would have testified favorably for defendant. Thus, defendant is unable to illustrate that defense counsel was objectively unreasonable for failing to call Clark or that calling Clark to testify would have resulted in defendant being acquitted at trial. Thus, defendant has failed to establish that defense counsel's actions constituted ineffective assistance of counsel.

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

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Talbot
/s/ Deborah A. Servitto