

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

CLYDE WAK-A-SHANCE RUECKERT,

Defendant-Appellant.

No. 306055
Leelanau Circuit Court
LC No. 11-001718-FH

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted of domestic violence, third offense, MCL 750.814. Defendant was sentenced to 30 to 180 months in prison as a fourth-offense habitual offender, MCL 769.12. Defendant appeals as of right. We affirm.

I. BASIC FACTS

Defendant and the victim had been dating off and on for about 8 years. On October 23, 2010, defendant and the victim were together and drinking when they ran out of beer. They called the victim's cousin to take them to the store to get more and, on the way back, defendant and the victim began arguing in the car. The cousin testified that she saw defendant's arm come around the seat and hit the victim in the face. The victim testified that defendant hit her, but was unsure exactly how it happened. Defendant testified that the victim threw a beer at him, he swatted it away, and the beer hit the victim in the face.

The victim suffered a broken nose and had a bruised face for several weeks. She also testified that defendant had hit her in the past, and defendant admitted at trial he had previously hit the victim. The prosecution also introduced evidence of four previous acts of domestic violence that defendant had committed, all involving the victim. Additionally the prosecutor admitted a statement that defendant had made to police in 2004, wherein he stated that he only hits women who deserve to be hit.

II. ADMISSION OF DEFENDANT'S PREVIOUS ACTS OF DOMESTIC VIOLENCE

First, defendant argues that the trial court abused its discretion by allowing the prosecutor to admit evidence of defendant's previous acts of domestic violence. Defendant argues that the

evidence was not admissible under MRE 404(b) because the prosecutor was using it to prove that he committed this crime, and it was unfairly prejudicial. We disagree.

Evidence of defendant's previous acts of domestic violence was admissible under MCL 768.27b(1), which provides in pertinent part that "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 not otherwise excluded under Michigan rule of evidence 403." Defendant has not demonstrated that the evidence was not relevant. The purpose of allowing in evidence of prior domestic violence acts is to give a complete picture of defendant's history, which will "shed light on the likelihood that a given crime was committed." *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011)(internal quotation marks and citation omitted). All four of the incidents involved the victim in the instant case. In all four cases, the victim suffered wounds to the head and face. We conclude that the trial court did not err in determining that this evidence was relevant under MRE 401.

Nor has defendant shown that the trial court erred when it refused to suppress the evidence pursuant to MRE 403. This evidence, which concerned prior acts of violence toward the victim, was highly relevant, especially where, as here, defendant alleged that the victim's injuries were accidental. *Cameron*, 291 Mich App at 610. While the evidence was prejudicial, the prejudice stemmed in large part from its highly probative nature, not due to a danger that the jury would give it undue weight. The probative value of the evidence was not substantially outweighed by unfair prejudice. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Additionally, the trial court provided a proper limiting instruction, which tended to cure any danger of improper use of the evidence. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). The trial court thus did not err in allowing the introduction of defendant's previous acts of domestic violence.

III. DEFENDANT'S PRIOR STATEMENT TO POLICE OFFICERS

Next, defendant argues that the trial court erred in admitting his prior statement to police officers that he only hits women who deserve to be hit. Even were we to find that the prosecution sought to admit this statement for its truth, we note that it is not hearsay. MRE 801(d)(2). Contrary to defendant's argument, this evidence was relevant, where defendant argued that the injury in the instant case was accidental. Defendant's reliance on *People v Brown*, 120 Mich App 765; 328 NW2d 380 (1982), to support his position that the statement should have been excluded, is misplaced. In *Brown*, the defendant made a statement that she had killed a man in the past. The *Brown* Court determined that the statement was irrelevant to the direct question of whether the defendant killed the current victim. *Id.* at 782-783. The Court determined that it was inadmissible because the statement would only be relevant to prove character under MRE 404(b), which it found to be improper. *Id.* By contrast, defendant's statement here is relevant as to whether he could, at the least, have had a motive to strike the victim if she "deserved" it or alternately, whether the injury to the victim was an "accident," as defendant maintained.

Defendant also relies on *People v DeRushia*, 109 Mich App 419; 311 NW2d 374 (1981), and states that, as in *DeRushia*, the statement made in this case was too remote to be relevant. In

DeRushia, the defendant made a statement that she could have killed the victim nine months prior to actually killing the victim. *Id.* at 423. The *DeRushia* Court held that the statement was irrelevant because the statement was made in connection to the victim's treatment of the defendant's children, but the murder occurred because of the victim's treatment of the defendant. *Id.* at 427. The statement was determined to be irrelevant not because of the time that had elapsed, as defendant asserts, but because of the context of the crime and the context in which the statement was made.

Here, the context in which defendant made the statement, and the context of the current crime, made defendant's statement relevant. Defendant's statement in 2004, that he only hits women who deserve to be hit, was made while he was being arrested for a domestic violence incident involving the victim. The circumstances surrounding that statement and the current incident are similar; defendant committed an act of domestic violence on the victim. The trial court did not err in determining that the statement was relevant because it tended to make it more or less likely that defendant hit the victim in this case. MRE 401; *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

Nor, for substantially the same reasons given above, do we find the decision to admit this evidence to be an abuse of discretion under MRE 403.

IV. THE PROSECUTION'S COMMENT ON DEFENDANT'S POST-MIRANDA SILENCE

Defendant also argues that his Fifth Amendment rights were violated by the prosecutor's persistent questions regarding his post-*Miranda* silence. We agree. *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Borgne*, 483 Mich 178, 187; 768 NW2d 290 (2009). However, defendant has not shown that he is entitled to relief. He failed to object below. Thus, to avoid forfeiture for plain error, the defendant carries the burden of proving the following: (1) there was an error, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Reversal is warranted only if the error seriously affected the integrity of the judicial system or resulted in the conviction of an actually innocent person. *Id.* at 763-764.

In this case, the prosecutor made numerous references to defendant's silence. However, the prosecutor's questions were prompted by defendant's version of the story that he was being set up by the victim. The prosecutor's questioning in this case is similar to the questioning that occurred in *Borgne*. *Borgne*, 483 Mich at 198. Also similar to *Borgne*, the prosecutor did not tie the references to defendant's guilt. Instead, the context of the questioning was to call into question the credibility of defendant's testimony. The prosecutor did not make obvious connections between defendant's silence and guilt, and instead used defendant's silence to argue that defendant's testimony should not be believed.¹ In addition, the prosecutor presented strong

¹ This is not strictly a use of the post-*Miranda* silence for "impeachment purposes" because defendant had not falsely testified that he had already told his exculpatory story to the authorities. See *Borgne*, 483 Mich at 192-193. Nevertheless, the thrust here was on credibility, rather than guilt.

additional evidence to support defendant's convictions. Both the victim and her cousin testified that defendant hit the victim in the face. And there was admissible evidence that defendant had committed similar acts of domestic violence on the victim in the past. In light of the nature of the prosecutor's use of defendant's silence, and the other evidence, defendant has failed to demonstrate that he was actually innocent or that the integrity of the judicial system was affected. See *Borgne*, 483 Mich at 198-199. Therefore, although there was error, defendant has failed to carry his burden under the plain error standard, and reversal is not warranted.

V. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor committed several instances of prosecutorial misconduct, which denied him the right to a fair trial. We disagree.

We are precluded from reviewing prosecutorial misconduct “. . . unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (internal quotation marks and citation omitted). Unpreserved claims of prosecutorial misconduct are therefore reviewed for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). To avoid forfeiture for plain error, the defendant carries the burden of proving the following: (1) there was an error, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *Carines*, 460 Mich at 763. “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Unger*, 278 Mich App at 235 (internal quotation marks and citation omitted).

A prosecutor has a duty to ensure justice, which is not just the conviction of the guilty. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). Claims of prosecutorial misconduct must be evaluated on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments must be considered as a whole in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. Generally prosecutors have great latitude in their argument and conduct, and are free to argue any reasonable inference that may arise from the evidence. *People v Bahoda*, 448 Mich 261, 282; 792 NW2d 53 (1995). And when arguing the inferences, the prosecutor does not have to use the blandest terms available. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Defendant argues that the three alleged errors already discussed were instances of prosecutorial misconduct. However, neither the admission of defendant's prior acts of domestic violence nor the admission of defendant's statement was error. Because there was no error, there was no prosecutorial misconduct. Although the prosecutor erred in questioning defendant on his post-*Miranda* silence, defendant has failed to demonstrate that it was plain error warranting reversal.

Defendant also argues that the prosecutor badgered defendant while questioning him about the events in the car. However, defendant fails to cite authority to support his position. A party cannot leave this Court to “discover and rationalize the basis for his claims, or unravel and

elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (citations omitted). Furthermore, the record indicates the prosecutor’s questioning was not badgering, but testing the credibility of defendant’s story. Defendant has not only failed to cite authority to support his position, but he has also failed to demonstrate error. *Carines*, 460 Mich at 763.

Defendant also argues that the prosecutor attempted to shift the burden of proof by arguing that there was no evidence that the victim was trying to set up defendant. Additionally, he contends the prosecutor “denigrated, belittled, and exceeded the bounds of decorum in arguing to the jury about [defendant’s] defense and testimony.”

Defendant correctly asserts that it is erroneous for a prosecutor to attempt to shift the burden of proof by commenting on the defendant’s failure to present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Furthermore, the prosecutor may not denigrate the defendant with excessive prejudicial arguments. *Bahoda*, 448 Mich at 282-283. But a prosecutor’s remarks and arguments must be considered as a whole, in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. This means that at times a remark or comment that would otherwise be error will not require reversal if the prosecutor was merely responding to the arguments of the defense. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001).

Defense counsel argued during closing argument that the victim threw a beer at defendant and defendant “swiped it away before it hit him and hit her in the face.” But, he contended, because it all happened so quickly, defendant was unable to specifically testify about how the victim threw the beer and how defendant blocked the beer. Defense counsel also argued that the victim should not be believed, and defendant’s version of being set up was more believable. The comments defendant now maintains were erroneous were a response to this assertion, and constituted a proper attempt to respond to and call into question defendant’s credibility. *Brown*, 279 Mich App at 135. Additionally, none of the prosecutor’s arguments or comments shifted the burden of proof. The comments and arguments made by the prosecutor merely pointed out the weaknesses of the defense theory and questioned defendant’s credibility. Defendant has failed to demonstrate that any of the prosecutor’s arguments or comments constituted error requiring reversal. *Carines*, 460 Mich at 763; *Unger*, 278 Mich App at 235.

Defendant contends that the prosecutor argued false information in maintaining that defendant’s version of events was not worthy of belief. Defendant discusses information the jury did not have available to it, such as defendant having stood trial once before, ending in a hung jury, and the fact that he presented consistent testimony during the two trials. What defendant fails to acknowledge is that, regardless of whether defendant testified consistently, the prosecutor was allowed to argue from the evidence whether defendant was worthy of belief. *Dobek*, 274 Mich App at 66. The prosecutor’s argument that defendant was not worthy of belief was consistent with the evidence that was admitted. Defendant has failed to identify how the prosecutor argued false information, and therefore has not demonstrated any plain error. *Carines*, 460 Mich at 763.

Defendant also argues that the prosecutor committed misconduct by testifying for the victim. During direct examination of the victim the prosecutor asked the following:

Q. And, just for the record, is Clyde here in Court today?

A. Yes.

Q. Can you tell me where he's sitting or what he's wearing. Is he behind me and wearing a suit sitting at the defense table?

A. Yeah.

The prosecutor then moved for the record to reflect identification of defendant, and defense counsel did not object.

Defendant fails to cite authority to support his argument that there was misconduct. Defendant also fails to indicate how the prosecutor testified for the victim. Defendant has not developed his argument. *Kevorkian*, 248 Mich App at 389. And even if we take this objection as an attempt to claim that the identification was tainted by leading questions, we note that another witness also identified defendant without objection. Nor did defendant raise any sort of identity defense below. Defendant has not demonstrated any error requiring reversal. *Carines*, 460 Mich at 763.

Defendant's last allegation of prosecutorial misconduct is that the prosecutor made an improper closing argument by using defendant's previous acts of domestic violence to argue that defendant had committed the current act of domestic violence. However, as discussed above, MCL 768.27b(1) allowed the admission of evidence of defendant's previous domestic violence acts. And the evidence was relevant and admissible to help the jury determine if defendant committed the current act.

VI. CUMULATIVE ERROR

Finally, defendant argues that the cumulative effect of all the alleged errors deprived him of a fair trial, and that he is entitled to a new trial. But the only actual error that occurred in this case was the prosecutor's reference to defendant's post-*Miranda* silence. And defendant has failed to demonstrate that it was plain error warranting reversal. Because there was only one error, which did not warrant reversal, there can be no cumulative effect warranting reversal. *Dobek*, 274 Mich App at 106.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Mark T. Boonstra