

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD B. WOODWARD,

Defendant-Appellant.

UNPUBLISHED

April 21, 1998

No. 197487

Oakland Circuit Court

LC No. 95-142775-FC

Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and two counts of resisting or obstructing a police officer, MCL 750.479; MSA 28.747.¹ Defendant was subsequently convicted by a jury of three counts of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to eight to twenty years' imprisonment for the assault with intent to commit murder conviction and to one to two years' imprisonment for each of the resisting or obstructing a police officer convictions. Those sentences were vacated, and the court imposed an eight- to twenty-year sentence and two one- to three-year sentences for the habitual offender convictions. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to quash the bindover. This Court's review of the circuit court's analysis of the bindover is de novo. *People v Reigle*, 223 Mich App 34, 36; 566 NW2d 21 (1997). This Court must determine if the magistrate committed an abuse of discretion in determining whether there was probable cause to believe that the defendant committed the offense charged. *Id.* at 36-37. An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification for the ruling made. *Id.* at 37. A defendant must be bound over for trial if evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator. *Id.* There must be some evidence from which each element of the crime may be inferred. *Id.* Probable cause that the defendant has committed the crime charged is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged. *Id.* At the preliminary

examination, the prosecution is not required to prove each element of the crime beyond a reasonable doubt. *Id.* Rather, where there is presented credible evidence both to support and to negate the existence of an element of the crime, a factual question that exists should be left to the jury. *Id.*

MCL 750.83; MSA 28.278 provides:

Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years.

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to kill may be proven by inference from any facts in evidence. *Id.* Defendant concedes that he assaulted the victim, but claims that there was no evidence presented to establish that he intended to kill her. We disagree.

At the preliminary examination, the victim testified that defendant held her down and choked her with his hands. Defendant stopped choking her and bit her on the back. Defendant grabbed her by the hair and threw her on the floor. She then attempted to flee, but defendant again grabbed her and pulled her back inside. Defendant resumed choking her. The victim believed he was going to kill her. She could not breathe when he was choking her. The police arrived and found defendant choking the victim. Moreover, Officer Timothy Plancon testified that when he entered the apartment, he saw defendant “on top” of the victim strangling her. The victim was gagging after defendant released her. The victim had marks around her chin and neck, blood coming from her nose and a swollen mouth and nose. Given this testimony, we find that there was more than sufficient evidence that defendant choked the victim with the intent to kill her. Accordingly, the trial court properly denied defendant’s motion to quash.

Defendant also argues that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence presented at trial from which rational jurors could determine beyond a reasonable doubt that he intended to kill the victim. Again, we disagree.

In reviewing a trial court’s decision on a motion for directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). Given Officer Plancon’s testimony that he saw defendant choking the victim, the victim’s testimony that she could not breathe while defendant choked her and believed that he was going to kill her, as well as the fact that she had abrasions around her neck and chin and that defendant did not stop choking her until the police arrived, rational jurors could determine beyond a reasonable doubt that at the time defendant assaulted the victim, he had the intent to kill her. Accordingly, the trial court properly denied defendant’s motion for a directed verdict.

Defendant next argues that the trial court abused its discretion in admitting evidence of the September 5, 1995 assault by defendant upon the victim because it was irrelevant and substantially

more prejudicial than probative. A trial court's decision to admit evidence will not be reversed absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). For this Court to find an abuse of discretion, the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.* Moreover, the erroneous admission of evidence is harmless error if there is overwhelming evidence against defendant from which reasonable jurors could find defendant guilty beyond a reasonable doubt. *Id.* at 4; *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. MRE 404(b)(1). However, evidence that is relevant to an issue other than a defendant's criminal propensity may be admitted if the danger of undue prejudice is not substantially outweighed by its probative value.² *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Specifically, evidence of other acts is admissible to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing an act. MRE 404(b)(1). Relevant evidence is defined by MRE 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

We believe that the trial court improperly admitted evidence that defendant assaulted the victim on September 5, 1995. However, because there was ample other evidence from which the jury could determine beyond a reasonable doubt that defendant intended to kill the victim, the improper admission of this evidence was harmless error.

Defendant next argues that he was denied his right to the effective assistance of counsel because his attorney did not investigate or raise the defense of intoxication. A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to errors apparent on the record. *Stewart, supra* at 42.

The victim and defendant testified that they shared a 40-ounce beer. Sergeant Steven Jennings testified that when he searched defendant at the jail, he found a crack pipe on him. However, there was no other indication that defendant may have been intoxicated at the time he assaulted Gibbs. Defendant claims that his attorney did not investigate the possibility of an intoxication defense. Because there was no evidentiary hearing, defense counsel was not able to indicate whether he in fact explored this defense. However, because this Court is limited to errors apparent on the record, and there is no indication that defendant was intoxicated that evening, there is no basis from which to conclude that defendant was entitled to an intoxication defense. Accordingly, defendant was not deprived of his right to the effective assistance of counsel.

Finally, defendant argues that he was denied a fair trial by prosecutorial misconduct. Defendant did not object to the alleged improper comments of the prosecutor. Appellate review of improper prosecutorial remarks is precluded absent objection by counsel, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *Stanaway, supra* at 687. We do not believe that our failure to fully review this issue will create a miscarriage of justice because the comments were not improper. Moreover, a cautionary instruction could have cured any prejudicial effect of the comments.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff

¹ Defendant was initially also charged with illegal entry, without owner's permission, MCL 750.115; MSA 28.310.

² MRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."