STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICKEY LEE DAVIS,

Defendant-Appellant.

UNPUBLISHED
June 5, 1998

No. 196803
Berrien Circuit Court
LC No. 95-003679 FC

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison without parole. We affirm.

I

Defendant first argues that he was denied effective assistance of counsel and the right to present an alibi defense because his defense counsel, White, was a law partner to defendant's previous attorney, Renfro, whom defendant substituted because he claimed he was incompetent. Defendant wanted to call Renfro to testify about why no alibi witnesses were called, but White argued that a conflict existed where he felt constrained from posing such an argument disfavoring his own law partner. Therefore, defendant contends that based on this conflict of interest, the court should have granted White's motion to withdraw, especially where a failure to do so deprived defendant of effective assistance of counsel and the right to present an alibi defense.

Whether a conflict of interest exists is a mixed question of fact and law subject to de novo review. *United States v Mays*, 77 F3d 906, 908 (CA 6, 1996). Rule 1.7 of the Michigan Rules of Professional Conduct states that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person, or by the lawyer's own interests." Because it is "difficult to measure the precise effect on the defense of representation corrupted by conflicting interests," prejudice is presumed if the defendant shows that "an actual conflict of interest adversely affected his lawyer's performance." *Strickland v Washington*, 466 US 668; 104

S Ct 2052; 80 L Ed 2d 674 (1984). However, the United States Supreme Court has held that when court-appointed defense counsel informs the court that his representation of the defendant creates a conflict of interest, the trial court must either appoint separate counsel or take adequate steps to determine whether the risk of a conflict is too remote to warrant separate counsel. *Holloway v Arkansas*, 435 US 475; 98 S Ct 1173; 55 L Ed 2d 426 (1978).

In this case, because the court ruled that Renfro's testimony would be irrelevant and thus inadmissible, the catalyst of the conflict was dispensed with—Renfro was not called to testify and White was not put in the position of having to impeach and discredit his own partner. Defendant also did not suffer the thwarting of his counsel's effective representation. Therefore, there was no actual conflict to adversely affect counsel's performance.

In any event, the existence of the alleged alibi witnesses and evidence is too speculative. Defendant wanted to run an ad in the newspaper, with his and his daughter's photograph, in an effort to locate an anonymous woman and two children who allegedly saw defendant and his daughter in the playroom of the Paw Paw McDonald's at the time of the murder. However, these supposed witnesses were never produced, and there is nothing in the record to indicate that such persons existed or could have been found or even would have come forward. The record also does not reflect why White, defendant's new counsel, could not try to locate these persons.

Further, the trial court took adequate steps to determine whether the risk of conflict was too remote to grant relief, and we conclude that the risk was too remote where defendant cannot now show that had Renfro further investigated, he definitely would have located the alleged alibi witnesses. Therefore, if White had called Renfro to testify, his testimony would not show that defendant was prejudiced in any way.

Neither was defendant denied his right to present an alibi. Defendant was not prevented from testifying about what Renfro allegedly failed to do or about defendant's whereabouts at the time of the killing. Defendant was not constrained from locating and calling alibi witnesses and evidence. Therefore, defendant was not denied his right to present such a defense.

Accordingly, no error occurred in the trial court's denial of counsel's motion to withdraw because no conflict of interest existed which prejudiced defendant.

II

Next, defendant argues that the other acts evidence introduced at trial was erroneously admitted because the prosecutor failed to give advance notice of his intent to use such evidence, the court failed to instruct the jury on the purpose for which the evidence may be considered, and the evidence was not otherwise admissible for any of the proper purposes under MRE 404(b).

Pursuant to MRE 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove a person's character to show action in conformity therewith. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). However, such evidence is admissible to show motive, opportunity, intent,

preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. *Id.* (citing *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 [1993]).

In this case, defendant alleges several instances where the court erroneously admitted other acts evidence, including defendant's prior threatening statements that he was going to kill the victim; the victim's problems with defendant; police testimony that defendant's girl friend, Melissa Peters, had a bruised cheek when she was arrested two days after the murder; that defendant's closet was found to contain guns and ammunition; and the impropriety of defendant's sexual relationship with Peters. First, defendant's threats to kill the victim were prior statements which do not constitute prior bad acts under MRE 404(b) because they are just that—statements, not prior bad acts. *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), aff'd 437 Mich 149; 468 NW2d 487 (1991). In any event, defendant's threats to kill the victim were highly probative of his "state of mind or predisposition to commit the crime." *Id.* Specifically, it was shown that defendant's statements were made in the context of his dissatisfaction with the custody of his daughter, which tended to establish the prosecution's theory that defendant was willing to kill the victim over their custody battle. The evidence of defendant's threats was also relevant to the element of malice or defendant's intent to kill the victim. *Id.* Furthermore, these statements would otherwise be admissible under MRE 801(d)(2) because they were made by a party opponent, defendant. *People v Goddard*, 429 Mich 505, 518 n14; 418 NW2d 881 (1988). Also, the highly probative value of this evidence is not outweighed by the danger of undue prejudice. Therefore, the court did not abuse its discretion in admitting this evidence.

Defendant also argues that other acts evidence was improperly admitted where the prosecutor, in his opening statement, remarked that the victim had "past problems with . . . Defendant." However, this was merely the prosecutor's opening statement, and the lawyers' statements and arguments are not evidence, CJI2d 3.5(5), a premise on which the jury was properly instructed. Accordingly, this comment by the prosecutor was not an offer of 404(b) evidence. In any event, prosecutors may argue the evidence and all reasonable inferences therefrom, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and the evidence presented at trial did show that the victim had problems with defendant.

Next, defendant argues that police testimony regarding Peters' bruised cheek was erroneously admitted under MRE 404(b). Here, the prosecutor asked Detective Renkawitz whether he recalled seeing Peters with any physical injury when he spoke with her upon her arrest two days after the incident. Renkawitz replied as follows:

> I recall seeing a . . . faint bruise under one of her cheeks, not really noticeable. She was wearing makeup, if I recall. She pointed out to me during one of the conversations, because I remember her crying and saying, "Well, how do you think I got this," and she pointed to a dark spot under her eye.

Defendant argues that this was suggestive of abusive conduct by defendant. However, the prosecutor did not inquire whether Peters indicated the bruise was inflicted by defendant or whether she stated that defendant abused her. Rather, Renkawitz's reference to what Peters said about the injury was an unresponsive, volunteered answer to a proper question, which did not constitute error requiring

reversal. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Therefore, this evidence was not a prior bad act under MRE 404(b). In any event, the evidence was relevant to whether defendant forced Peters to shoot the victim because Peters had testified earlier that defendant hit her and told her he would kill her if she did not do so.

Defendant next argues that the guns and ammunition found in his apartment and admitted at trial constituted improper other acts evidence. However, the prosecution did not offer this evidence under MRE 404(b), and defendant did not object on this basis. Therefore, this issue is waived.

Defendant also argues that it was error to allow the prosecutor to comment on defendant's sexual relationship with Peters. The prosecutor cross-examined defendant regarding the fact that he is forty-four years of age and Peters is eighteen, and that they had a sexual relationship. In his closing argument, the prosecutor characterized Peters as "just a convenient little baby-sitter and sex object" to defendant. However, on direct examination defendant stated that he originally hired Peters as a live-in baby-sitter and that a relationship later developed between them. Therefore, this was a proper subject matter for cross-examination. Also, this evidence was relevant to whether Peters had any allegiance to defendant to act in concert with him. In any event, this evidence was not offered by the prosecutor as 404(b) evidence, and again defendant did not object on those grounds. Further, because prosecutors may use "hard language" when it is supported by the evidence, and need not frame their arguments in the blandest possible terms, *Ullah*, *supra*, 678, the prosecutor's closing comments were not improper.

Defendant also argues that the prosecutor failed to give advance notice of his intent to use other acts evidence. However, the prosecutor did file a pretrial motion of his intent to introduce certain other acts evidence. Further, none of the now-challenged evidence was offered as other acts evidence, thus explaining its absence from the prosecutor's 404(b) motion. Therefore, there was no error here.

Defendant also argues that the court failed to specify the purpose for which the other acts evidence may be considered. A defendant, upon request, is entitled to a limiting instruction regarding the jury's proper consideration of 404(b) evidence, and a court's failure to give the instruction, when requested, warrants reversal. *People v Mitchell*, 223 Mich App 395, 397; 566 NW2d 312 (1997). However, in the absence of a request or objection, a court does not have a sua sponte duty to give limiting instructions, even if such an instruction should have been given. *People v Chism*, 390 Mich 104, 120-121; 211 NW2d 193 (1973). In this case, defendant did not request such an instruction, and, therefore, the court cannot be faulted for not giving one. *Id.*

Accordingly, the trial court did not abuse its discretion regarding the admission of other acts evidence.

III

Next, defendant argues that the prosecutor improperly asked defendant to comment on the credibility of witnesses, and made remarks regarding matters not supported by the evidence, and which were designed to appeal to the fears and prejudices of the jurors—diverting their attention from the relevant issues, all of which denied defendant a fair trial.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Defendant alleges several instances of prosecutorial misconduct, some of which were objected to at trial, and others which passed without objection. Defendant first argues that on six separate occasions during the prosecutor's cross-examination of him, he asked defendant to comment on the credibility of one of the prosecution's police witnesses, Detective Renkawitz, regarding Renkawitz's testimony about statements defendant made to him. While it is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses because matters of credibility are for the trier of fact, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), defendant failed at trial to raise an objection to any of the questions posed to him regarding Renkawitz's testimony. A timely objection could have precluded any further questioning of this type, and could have elicited a cautionary instruction from the court thus curing any possible prejudice. See *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995), modified on other grounds sub nom *People v Grove*, 455 Mich 439; 566 NW2d 547 (1997).

In any event, the record shows that at no time did defendant specifically state that Renkawitz lied. Rather, defendant handled the questions well by simply stating that he thought Renkawitz was either mistaken about what he told him, or that he misunderstood, forgot, or did not fully recollect the statements made to him by defendant. See *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988). At one point defendant even pointed out that the prosecutor was misstating Renkawitz's testimony. Therefore, defendant successfully responded to the prosecutor's questions, and no prejudice occurred.

Defendant also argues that the prosecutor improperly asked him to comment on the credibility of his former employer, John Morrissey, regarding defendant's termination from his job. The prosecutor asked defendant whether he thought Morrissey would be lying if he testified that he had told defendant he could either quit or be fired on the spot. However, Morrissey was not called to testify. Therefore, this was not an instance where defendant was being asked to comment on the credibility of a prosecution witness. Furthermore, defendant again handled the question well, merely disputing the accuracy of the information. Moreover, defense counsel objected on grounds of relevance when the prosecutor further pressed the issue, and the prosecutor moved on. Therefore, defendant suffered no prejudice.

Defendant also argues that the prosecutor twice asked him to comment on the credibility of other prosecution witnesses. On the first of these occasions, defense counsel objected and the prosecutor dropped that line of questioning and rephrased the question. Therefore, defendant was not harmed. On the second occasion, defendant failed to object to such questions regarding both Gary Szczepaniak's and Peters' testimony about whether one of the guns defendant previously test-fired at Szczepaniak's farm was the gun alleged to have been used in the shooting. Again, a timely objection

could have precluded further questioning along these lines, and a cautionary instruction could have been requested to cure any possible prejudice. *Austin, supra,* 570. And again, defendant merely disputed the accuracy of the testimony, at one point merely stating that Peters was wrong about the gun.

Defendant also contends that the prosecutor made remarks regarding matters not in evidence, and which were intended to appeal to the fears and prejudices of the jurors. Here, defendant argues that the prosecutor committed misconduct when he questioned defendant about his ownership of guns and shooting equipment, asking defendant why he owned a .44-caliber handgun with a fast draw holster—if he thought he was "Wyatt Earp, Clint Eastwood." Defendant also alleges that the prosecutor wrongly questioned him about why he told the victim, when he had been fired, that he could not meet her that day until 6:00 p.m. because he had to work. The prosecutor said, "You could have had an extra hour with your precious daughter, if you picked her up in Benton Harbor at 5:00 o'clock." Although prosecutors are given great latitude regarding their arguments and conduct, they "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda, supra,* 282-283. Prosecutors also may not make statements of fact to the jury which are unsupported by the evidence. *People v Stanaway,* 446 Mich 643, 686; 521 NW2d 557 (1994). However, defendant failed to raise an objection to either of the questions now challenged, and a timely cautionary instruction could have cured any prejudice. This is especially true here because although the challenged remarks were potentially denigrating to defendant, they did refer to and were fostered by evidence presented at trial—it amounted to commentary on the evidence. Compare *People v Fredericks,* 125 Mich App 114, 118; 335 NW2d 919 (1983). Indeed, the propriety of a prosecutor's remarks depends on all the facts of the case, and the remarks must be read as a whole. *People v Johnson,* 187 Mich App 621, 625; 468 NW2d 307 (1991). Also, a prosecutor's comments must be evaluated in light of the relationship or lack of relationship they bear to the evidence admitted at trial. *Id.* Here, the prosecutor did not just conjure up denigrating comments. Therefore, given that the prosecutor was referring to the evidence and the facts of the case rather than disparaging defendant, any prejudice could have been quickly cured by a timely instruction. Therefore, reversal is not warranted.

For the foregoing reasons, defendant was not denied a fair and impartial trial as a result of prosecutorial misconduct.

IV

Defendant next argues that he was denied effective assistance of counsel because his first attorney failed to properly investigate and develop an alibi defense, and his second attorney failed to salvage an alibi defense by not presenting evidence regarding his partner's inadequate investigation of an alibi.

"[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms,

(2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the

proceeding was fundamentally unfair or unreliable. *Stanaway, supra,* 687-688; *People v Poole,* 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Effective assistance is presumed, and defendant bears a heavy burden of proving otherwise. *Stanaway, supra,* 687.

In this case, defendant specifically argues that trial counsel did not afford him effective assistance because his first attorney, Renfro, failed to develop his alibi defense when there was still time to find potential witnesses who would remember defendant and his daughter at the Paw Paw McDonald's. Defendant also claims that his second attorney, White, was ineffective for failing to salvage the alibi defense by eliciting testimony from defendant regarding Renfro's inadequate investigation.

Defendant's argument that Renfro was ineffective for failing to fully investigate and attempt to locate alibi witnesses is without merit because even if Renfro had taken such measures, it is speculative whether any such witnesses would have been located because defendant has failed to produce any alibi witnesses Renfro supposedly missed as a result of his failure to look. Therefore, defendant cannot establish that he was prejudiced by Renfro's actions, and ineffective assistance of counsel will not lie without a showing of prejudice. *Poole, supra,* 717.

Defendant also argues that Renfro was ineffective because he advised defendant that investigating further was not necessary because the prosecution had no case and defendant would be acquitted. However, as the trial court pointed out, at that time, before Renfro was substituted, his advice may have been sound given the fact that Peters, the state's eyewitness, was not prepared to testify against defendant, and the "prosecutor would have a real tough time convicting . . . without that evidence." The question is not whether, in retrospect, counsel's advice was right or wrong; it is whether the advice was within the range of competence demanded of lawyers in criminal cases. *People v Haynes (After Remand),* 221 Mich App 551, 558; 562 NW2d 241 (1997). Therefore, Renfro was not incompetent at the time in advising that the prosecution's case was weak.

Defendant also argues that White failed to adequately salvage the alibi defense by only introducing testimony by defendant himself regarding Renfro's inadequate investigation. However, defendant did testify that he and his daughter ate at the Paw Paw McDonald's and stayed there until about 8:00 p.m. Defendant stated that there was an elderly lady with two children using the play room with his daughter in the McDonald's. Defendant stated that he then headed back east and picked up Peters in Vicksburg, and they headed back to Lansing. Therefore, counsel did elicit some alibi evidence from defendant. Defendant is correct that White did not ask defendant about Renfro's failure to further investigate an alibi. Whatever counsel's reasoning, decisions on what evidence to present is presumed to be a matter of trial strategy, *People v Mitchell,* 454 Mich 145, 163; 560 NW2d 600 (1997), and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378, (1987).

Defendant's argument that while awaiting the hearing on his motion to substitute counsel, critical evidence such as records of calls made to his pager which would have verified that he was paged from the victim's house, and local calls made from the victim's home supporting his version of the events, were lost because such records are kept for only thirty days, is unmeritorious. This is speculative because defendant has not shown that there were any such records in the first place, the loss of which

prejudiced him because of his attorney's incompetence. As with the absence of the alleged alibi witnesses, such evidence is also speculative at best and will not support a finding of ineffective assistance of counsel.

Accordingly, defendant was not deprived of is right to effective assistance of counsel.

Finally, we have carefully reviewed the issues raised in defendant's supplemental brief and find them to be without merit.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski