

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER C. DROMES, JR.,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 198433
Oakland Circuit Court
LC No. 96-145047 FH

Before: Talbot, P.J., and McDonald and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, felonious assault, MCL 750.82; MSA 28.277, and malicious destruction of property over \$100, MCL 750.380; MSA 28.612. At his sentencing, defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to five to ten years' imprisonment on the assault with intent to do great bodily harm less than murder conviction, two to four years' imprisonment on the felonious assault conviction, and two to four years' imprisonment on the malicious destruction of property over \$100 conviction. The court then vacated those sentences and sentenced defendant as an habitual offender, fourth offense, to concurrent prison terms of five to twenty years, two to fifteen years, and two to fifteen years. Defendant now appeals as of right. We affirm.

This case arises from an incident at the home of the victim. Defendant assaulted the victim, breaking her jaw in several places, threatened and chased the victim's son with a crowbar, and broke down the door and several windows and knickknacks in the victim's home.

On appeal, defendant first contends he was denied the effective assistance of counsel. Specifically, he argues trial counsel's failure to assert an intoxication defense, his waiver of the trial court's error in failing to give the specific intent instruction for aggravated assault, and his failure to put forth a viable defense on two of the three charges rendered counsel constitutionally ineffective. We disagree.

Because defendant failed to move for a new trial or an evidentiary hearing, this Court's review is limited to the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish ineffective assistance of counsel, a defendant must show that trial counsel's performance was below an objective standard of reasonableness according to prevailing professional norms, and that there is a reasonable probability that absent counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996).

We find that counsel's performance did not fall below an objective standard of reasonableness. Based on the record, we do not find error, nor do we find that there was a reasonable possibility that the outcome would have been different had counsel asserted an intoxication defense, not waived the jury instruction on specific intent, or defended against all three charges. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be a matter of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), as is conceding guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). 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). Furthermore, waiver of the instruction on specific intent did not constitute error as the instructions in their entirety covered the substance of the omitted instruction. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Next, defendant argues the trial court erroneously admitted evidence of his prior assaultive conduct against the victim, thereby depriving him of a fair trial. The admissibility of other acts evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579-580; 536 NW2d 570 (1995). An abuse of discretion will be found only when an unprejudiced person, considering the facts upon which the trial court made its decision, would find there was no justification or excuse for the ruling. *Id.*

Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). However, it is not admissible if offered solely to show the criminal propensity of an individual and that he acted in conformity with that propensity. *Id.* at 65. Essentially, other acts evidence is admissible whenever it is relevant on a noncharacter theory. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

Because defendant did not deny that he hit the victim or deny that he intended to hit the victim, the only noncharacter theory under which the evidence of defendant's prior assault on the victim could possibly be relevant and thus properly be admitted would be to show defendant's knowledge of his ability to inflict great bodily harm less than murder with his fists. However, it does not appear from the testimony that defendant inflicted great bodily harm less than murder in his previous assault. The testimony showed that he punched the victim, causing her a black eye, a considerably less serious injury than a fractured jaw. Because the evidence appears to be relevant only to show that defendant had a propensity for violence, it is inadmissible under MRE 404(b) and *VanderVliet*. Although we find that

the evidence of defendant's prior assault on the victim was improperly admitted, in light of the strength and weight of the untainted evidence in this case, we find it is highly probable that the improperly admitted evidence did not contribute to the verdict. Accordingly, the error was harmless. *People v Harris*, 458 Mich 310, 320; 583 NW2d 680 (1998); *People v Gearn*s, 457 Mich 170, 204 (Brickley, J.), 207 (Cavanagh, J., concurring in part and dissenting in part); 577 NW2d 422 (1998).

Finally, defendant argues the prosecutor's improper comments during closing and rebuttal deprived him of a fair trial. Claims of prosecutorial misconduct are decided on a case by case basis. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court reviews the record and evaluates the prosecutor's remarks in context. *Id.* The test is whether defendant was denied a fair and impartial trial. *Id.* However, appellate review of alleged prosecutorial misconduct is precluded if the defendant fails to object or request a curative instruction, unless the misconduct was so serious that no curative instruction could have removed the prejudice to the defendant, or if failure to review would result in manifest injustice. *Id.* at 341-342.

Defendant contends the prosecutor improperly attacked the credibility of defense counsel, improperly appealed to the jurors' sympathies for the victim, and improperly stated his opinion regarding defendant's guilt and vouched for the truthfulness and credibility of various prosecution witnesses. Defendant failed to object to any of the alleged instances of prosecutorial misconduct in this case. Because the comments made by the prosecutor were not improper and curative instructions, if timely requested, would have removed any potential prejudice to defendant, manifest injustice will not result from our failure to review this unpreserved issue.

Affirmed.

/s/ Michael J. Talbot
/s/ Gary R. McDonald
/s/ Janet T. Neff