STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

        Plaintiff-Appellee,

v

JEREMIAH PAUL CHODAK,

        Defendant-Appellant.

UNPUBLISHED
December 26, 2000

No. 215494
Macomb Circuit Court
LC No. 98-001700-FC

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for first-degree murder, MCL 750.316; MSA 28.548, following a jury trial. Defendant was sentenced to life in prison without the possibility of parole. We affirm.

On appeal, defendant raises two evidentiary issues. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, whether evidence is admissible is a question of law we review de novo. *Id*.

Defendant first argues that the trial court erroneously curtailed his psychological expert's testimony by prohibiting the expert from testifying regarding defendant's statements. The expert concluded that defendant acted on impulse when he killed his girlfriend. He explained that he based his opinion on numerous mental health records and a forty-five minute to one-hour interview with defendant just before trial and eight months after the girlfriend's death.

An out-of-court statement offered to prove the truth of the matter asserted is generally inadmissible unless it falls under an exception to the hearsay rule. MRE 801, 802; *People v Burton*, 177 Mich App 358, 362; 441 NW2d 87 (1989). In this case, it is clear that defendant's statements to his expert were hearsay and would only be admissible under one of the exceptions in MRE 803 or 804.

At trial, defendant suggested that his statement to his expert was admissible to show his "[t]hen existing mental, emotional, or physical condition." MRE 803(3). In this case, the statements at issue did not show defendant's "then existing" state of mind, but instead were statements of memory of past events that are specifically excluded under MRE 803(3). *People v*

Furman, 158 Mich App 302, 317; 404 NW2d 246 (1987); *People v DeRushia*, 109 Mich App 419, 424-425; 311 NW2d 374 (1981). It is apparent that the statement was too remote to show defendant's mental condition at the time because defendant made the statement months after his girlfriend's death. *Id*. In addition, defendant's self-serving statement does not fall under any of the exceptions in MRE 804. We hold that the trial court properly excluded defendant's statements as inadmissible hearsay.

Defendant also argues that his statement to his expert is admissible as a fact underlying the expert's opinion. Defendant cites no authority for the proposition that his expert can testify to his out-of-court statements. Instead, he relies upon cases in which the prosecution elicited testimony about the underlying facts to attack the credibility of the expert's opinion.[1] Although this Court has held that the facts underlying an expert's opinion may be admitted on cross-examination, the present case is distinguishable from the cases on which defendant relies because, in this case, defendant sought to introduce his own hearsay statements through the direct testimony of his psychological expert. *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992).

An expert may base an opinion on hearsay evidence or rely on historical data in forming an opinion regarding a criminal defendant's responsibility. MRE 703; *Dobben*, *supra* at 695-696, 698; *People v Caulley*, 197 Mich App 177, 194-195; 494 NW2d 853 (1992). The trial court has the discretion to determine whether the facts underlying the expert's opinion should be admitted into evidence. MRE 703; *Swanek v Hutzel Hospital*, 115 Mich App 254, 260; 320 NW2d 234 (1982). The trial court is not required to admit hearsay evidence simply because that evidence formed the basis of an expert's opinion. *Furman*, *supra* at 326-327; *Tiffany v The Christman Co*, 93 Mich App 267, 279-280; 287 NW2d 199 (1979).

Here, defendant's expert testified that defendant had diminished capacity at the time he killed his girlfriend and did not premeditate the murder and that he derived these opinions, in part, from an interview of defendant. To permit the expert to recount defendant's statements from that interview would, in effect, allow defendant to testify without being under oath or subject to cross-examination. *Furman*, *supra* at 326. Contrary to defendant's assertions, admission of his statements would not enhance the reliability of the truth-finding process. *Dobben*, *supra* at 695. We conclude that the trial court acted within its discretion when it prevented defendant's expert from testifying to defendant's out-of-court statements.

Next, defendant argues that the trial court erroneously admitted evidence of his prior conviction for domestic assault against his girlfriend. Evidence of defendant's other crimes is not admissible to prove character or propensity to commit such acts. MRE 404(b); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, such evidence may be admitted for other purposes, such as proof of motive, intent, or absence of mistake or accident. MRE 404(b)(1). Other acts evidence does not violate MRE 404(b) unless it is offered solely to

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[1] Specifically, defendant cites *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Dobben*, 440 Mich 679; 488 NW2d 726 (1992); *People v Caulley*, 197 Mich App 177; 494 NW2d 853 (1992).

show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

In this case, the prosecution sought to introduce evidence of defendant's prior conviction for domestic assault, arguing that the conviction was relevant to show defendant's violence toward Eve and that he intended to kill her, to rebut a claim of accident or mistake, and to rebut a diminished capacity defense. The trial court decided to admit the evidence because it was relevant to defendant's intent and its probative value outweighed its prejudicial effect. Defendant argues that the domestic assault conviction is not relevant to any of the purposes listed in MRE 404(b) and the prosecutor failed to articulate a relationship between the evidence and the purposes for which it was offered. We disagree.

Defendant's intent was a material issue in his trial. The prosecutor argued that defendant's prior assault on the girlfriend showed that he intended to harm her in the past, from which the jury could infer that he was capable of premeditation. Evidence of marital discord is admissible to show a motive for murder or as circumstantial evidence of premeditation and deliberation. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Here, defendant's conviction for domestic assault is evidence of discord within their relationship and relevant to motive, premeditation, and deliberation. Further, the trial court properly instructed the jury to limit its use of this evidence to the issue of defendant's intent. *People v Mitchell*, 223 Mich App 395, 397; 566 NW2d 312 (1997). We conclude that the trial court did not abuse its discretion when it admitted evidence of defendant's prior conviction for domestic assault.

Defendant's remaining allegations of prosecutorial misconduct and ineffective assistance of counsel are not preserved for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). We find nothing improper in the prosecutor's remarks in his closing argument. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Further, any prejudice that resulted from the alleged misconduct could have been cured by a limiting instruction. *Id*. Based on our review of the existing record, we also conclude that defendant's claim of ineffective assistance of counsel is without merit because he failed to establish that his counsel's performance was objectively unreasonable. *Snider*, *supra* at 423.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter