

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAND WALTER GOULD,

Defendant-Appellant.

UNPUBLISHED

November 27, 2001

No. 218729

Oakland Circuit Court

LC No. 98-161396-FC

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, killing or torturing an animal, MCL 750.50b(2), and kidnapping by secret confinement, MCL 750.349. He was sentenced as a third habitual offender, MCL 769.12, to thirteen to twenty years' imprisonment for the assault conviction, thirty-two to ninety-six months' imprisonment for the conviction of killing or torturing an animal, and twenty-five to fifty years' imprisonment for the kidnapping conviction. He appeals as of right. We affirm.

Defendant's convictions stem from an incident in which he tied up his girlfriend in their basement with duct tape, beat her over the head with a baseball bat, slammed her head against a wall, strangled her, threatened to kill her and put her body in a grinder, and kicked her pet poodle, paralyzing it and causing it to be euthanized. Defendant's position at trial was that his girlfriend's injuries were self-inflicted.

Defendant first argues that the trial court abused its discretion by admitting evidence under MRE 404(b) that he had assaulted another girlfriend in the past. Because the evidence was offered to show defendant's identity as the perpetrator through *modus operandi*, we apply the following test from *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982): (1) there must be substantial evidence that the defendant committed the other act; (2) there must be some special quality of the act that tends to prove the defendant's identity; (3) the other-acts evidence must be material to the defendant's guilt of the charged offense; and (4) the probative value of the other-acts evidence must not be substantially outweighed by the danger of unfair prejudice. See also *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998).

Here, there was substantial evidence that defendant assaulted his former girlfriend—she testified about that assault at trial. Also, there was enough similarity between the assault on the former girlfriend and the assault on the victim in this case to show defendant's identity as the

perpetrator. The victim was dragged to the basement, where defendant wrapped duct tape around her mouth, wrists, and ankles. Defendant strangled the victim, and threatened to kill her and put her body into a grinder. Defendant's prior assault on his former girlfriend bore a striking resemblance. Defendant handcuffed that girlfriend to a bed, and wrapped duct tape around her mouth, wrists, and ankles. He strangled her, and threatened to kill her and chop her body into pieces. As in *Ho, supra* at 187, "the similarity in the crimes pointed to defendant as the perpetrator of this crime."

Moreover, this evidence was material to defendant's guilt. Defendant argues that identity was not at issue, but he claimed that the victim's injuries were self-inflicted. Thus, the similarity between the two assaults was material to show that the victim's injuries were inflicted not by herself, but by defendant. Finally, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. The trial court carefully exercised its discretion and excluded some details of the prior assault that were too gruesome to reveal to the jury. We also note that the trial court gave a detailed cautionary instruction to the jury regarding the proper use of this other-acts evidence. Defendant has not shown that the trial court abused its discretion.

Next, defendant claims that the trial court erred by allowing several witnesses to testify about hearsay statements made by the victim. As to the testimony of all of those witnesses except one, defendant has forfeited this unpreserved issue because he has failed to demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). As to the testimony of an officer regarding the victim's statements, which was objected to by defendant, there was no abuse of discretion. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). Pursuant to MRE 801(d)(1)(B), the statements qualified as prior consistent statements offered to rebut the charge that the victim fabricated her claim that defendant committed the assault. Additionally, the victim described the assault to several witnesses who testified that the victim was extremely upset when she made the statements.¹ The challenged statements were thus admissible as excited utterances. MRE 803(2). Further, the statements to medical personnel were also admissible as statements made for purposes of medical treatment pursuant to MRE 803(4). Because the statements were admissible, trial counsel was not ineffective for failing to object. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Next, defendant claims that he was denied his right to counsel of his choice when his first retained attorney withdrew from the case after being confronted with allegations that he had attempted to induce the victim not to testify. Defendant claims that the trial court should have held an evidentiary hearing before removing his retained attorney, pursuant to *People v Crawford*, 147 Mich App 244, 250; 383 NW2d 172 (1985). However, the trial court did make a "careful inquiry." *Id.* The prosecutor presented a letter from the victim to substantiate the

¹ Detective Sergeant Brent Hostutlar testified that the victim's account of the crime was consistent with statements made to another officer; however, Hostutlar's interview with the victim occurred after she had been treated at the hospital. Regardless of any hearsay implications, the evidence was cumulative, and defendant did not show that he was prejudiced by Hostutlar's testimony.

allegations, and defendant's attorney declined the trial court's offer to present further evidence. Instead, the attorney sought his own legal representation, and ultimately agreed to withdraw from the case. Both the prosecutor and the trial court acted appropriately.

Defendant also alleges that the prosecutor acted improperly by eliciting testimony from two witnesses, the victim and the former girlfriend, that defendant had been in jail before. As to the former girlfriend's testimony, defendant has forfeited this unpreserved claim of prosecutorial misconduct because he has not shown plain error affecting his substantial rights. *Carines, supra* at 763. As to the victim's testimony, which was objected to by defendant, there was no error. A review of the challenged testimony reveals that the witnesses' answers were not responsive to the prosecutor's proper questions, and the prosecutor quickly diverted the witnesses away from the subject matter of defendant's prior jail history. The prosecutor's good-faith questioning of these witnesses cannot support a claim of prosecutorial misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Next, defendant claims that the trial court erroneously denied his motion for an evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), on his claims of ineffective assistance of counsel. We review this issue for an abuse of discretion. See *In re Whittaker*, 239 Mich App 26, 30; 607 NW2d 387 (1999). Here, the trial court concluded that defendant's bare allegations of ineffective assistance of counsel did not warrant an evidentiary hearing, especially since defendant could not demonstrate that he was prejudiced by the alleged errors of counsel. The court balanced the burden of conducting an evidentiary hearing against the likelihood of success of defendant's claims, and concluded that a hearing was not warranted. On appeal, defendant fails to specify what a hearing would have elicited to support his claims of ineffective assistance of counsel. Defendant's conclusory assertion that the trial court was required to conduct a hearing is unpersuasive. Defendant has not demonstrated that the trial court abused its discretion.

Defendant also claims that the trial court erred by denying his motion to reconstruct one volume of the trial transcript, which was prepared by a court reporter whose certification had expired. Although only certified court reporters may prepare transcripts, MCR 8.108(G)(1)(a), defendant must nonetheless demonstrate prejudice in order to obtain any relief. *In re Ernst*, 130 Mich App 657, 661; 344 NW2d 39 (1983). Here, defendant claims that he was prejudiced because the transcript contained several inaccuracies. In order to overcome the presumption of accuracy and obtain relief, a defendant must seek relief seasonably, specifically assert the alleged inaccuracies, provide some independent corroboration of those alleged inaccuracies, and describe how they prejudiced his ability to secure postconviction relief. *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993). In this case, defendant has failed to provide any corroboration of his claims of inaccuracy. Indeed, a careful review of each of his claims is flatly contradicted by the record. Defendant has not established a basis for relief.

Finally, defendant claims that his sentences are disproportionately severe because they are at the upper end of the sentencing guidelines recommended range. Defendant's argument is misplaced. The judicial sentencing guidelines do not apply to habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). Moreover, even if they did, defendant has not shown any unusual circumstances that would overcome the presumption

that a minimum sentence within the guidelines is proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). In light of defendant's past assault on another girlfriend, his convictions stemming from terrorizing and brutally beating the victim in this case demonstrate that he is unable to conform his conduct to the law. Therefore, his sentences do not constitute an abuse of discretion. *Hansford, supra* at 323-324.

Affirmed.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ William B. Murphy