STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 12, 2002
v	No. 229082 Oakland Circuit Court
JOSEPH EDWARD DAVIS, Defendant-Appellant.	LC No. 00-172028-FH

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

A jury convicted defendant Joseph Edward Davis of first-degree home invasion,[1] and felonious assault.[2] The trial court sentenced Davis as a third habitual offender[3] to concurrent prison terms of 7½ to 40 years for the home invasion conviction and 35 months to 8 years for the felonious assault conviction. Davis appeals as of right. We affirm.

I. Basic Facts And Procedural History

On April 7, 2000, Sheryl Koperta was in her Hazel Park home with her teenage son and his friends. One of the young people, "Curtis," left the house to retrieve something from a car, when Davis, a neighbor, screamed at him. Amber Denman, Koperta's guest, said that Curtis "was like, you know, whatever, and went back in the house," but then "James" stepped outside and Davis screamed at him as well, provoking a similar response. Approximately five minutes later, Denman saw Davis approach Koperta's house looking angry. He "walked up the steps, came to the door and then hit it with his fist and the knife. And broke the plexiglas" by "punch[ing]" the serrated knife through it. Koperta, who heard the commotion and went to investigate it, saw "everybody . . . like standing still, like shocked," and Davis's "hand [was protruding] through my plexiglas screen door window, with a knife in it." Davis "was slashing" the knife at Koperta as she tried to close the door, saying "I'm going to kill you, you mother f---er." This forced Koperta to back away from the door, but Davis's "common law wife," Debra Kendle, came up the steps and "distracted him somehow," perhaps touching his shoulder.

[1] MCL 750.110a(2).

[2] MCL 750.82(1).

[3] MCL 769.11.

Koperta slammed the door, at which time Davis reportedly turned and started "slashing" at Kendle's body with the knife, eventually cutting Kendle's cheek and neck while saying "I'll kill you too, bitch." Davis and Kendle then "sort of tumbled off" Koperta's "front porch."

David James Green, an officer with the Hazel Park Police Department, responded to a dispatch concerning "a man stabbing or cutting his wife." When Green arrived at the scene, he learned that Davis was inside a house, had a knife, and had cut his wife. Green and a fellow officer knocked on the front door of the house in question, Davis came to the door, Green and the other officer ordered Davis outside, but Davis responded by saying "f--k you, he's not coming out." The door was obscuring the left side of Davis's body, so the police continued to order Davis to come out of the house "until both of his hands were visible." Green then opened the door and led Davis, whose hands were empty, out of the house. However, Kendle who was bleeding from the neck and face, ran behind Green into the house. Green pursued her, and brought her outside to identify her and to obtain medical attention for her. As Green explained at a subsequent evidentiary hearing, at that point he and one or more other officers entered the house to secure it "for officer safety," going through the residence to make certain no one was in it. In police officer Joseph Lowry's view, "there were two occupants, we were unsure if there were more." While conducting this sweep, Green spotted a wet "steak knife with a wooden handle" behind the front door, which he seized.

Meanwhile, police officer Janeen Gielniak arrived at the scene and approached Kendle. Kendle indicated that she wanted to return to the house to change her clothing. Gielniak agreed to allow her to do this while accompanied by an officer. First, however, paramedic Roger Joseph Degroote treated Kendle, who was "pretty agitated, upset and very bloody," for a laceration on her cheek that was three or four inches long and still bleeding. Kendle reported the injury occurred because someone slammed a door on her head, but Degroote observed that her injuries appeared to be "an incision with a sharp object." Gielniak then took Kendle into the house before sending her to the hospital.

The prosecutor charged Davis with one count of home invasion, one count of felonious assault against Kendle, and one count of felonious assault against Koperta. According to Kendle, the young people next door were yelling abusively at Davis, so she encouraged him to talk to Koperta. Kendle saw Davis trip over imperfections in Koperta's stairs, causing him to fall into the door, through its Plexiglas window, though Denman denied seeing this accident occur. Kendle then went to help Davis, but several of the young people were pulling at him. "And," said Kendle, "I reached in, I had to reach over because he wasn't completely standing up yet, and when I reached over to get this kid's hand off his arms, when I pulled my face back, that is when I scratched my face on the glass," meaning the Plexiglas. Kendle stated that Davis did not have a knife, and certainly did not slash at her. Lowry, however, impeached Kendle, noting that Kendle was "[h]ighly agitated, highly intoxicated," that night, "[h]er eyes were glassy, speech was slurred. She had difficulty maintaining balance," she smelled of intoxicants and was not cooperative. The jury acquitted Davis of assaulting Kendle, but otherwise found him guilty as charged.

II. The Knife

Davis contends that the trial court erred when it denied his pretrial motion to suppress the knife on the basis of his argument that the warrantless police search that revealed the knife was a

violation of his Fourth Amendment rights.[4] The trial court, in denying the motion to suppress the knife, reasoned that a number of exceptions to the Fourth Amendment's warrant requirement applied in this case, including the exigent circumstances and protective sweep exceptions, and the plain view doctrine. Even if we accept for the sake of analysis that the police procedure in this case was constitutionally improper, and therefore the trial court erred in refusing to suppress the knife, we are confident that any such error would have been harmless in the context of this case. Several witnesses testified that they saw Davis with a knife at Koperta's house, Koperta said that he slashed at her with the knife, and though Kendle denied that Davis had a knife, Degroote's description of her lacerations was consistent with a knife wound and excluded other causes of her injuries. Suffice it to say, whether the jury saw the knife was virtually inconsequential to its ability to determine that Davis had committed a felonious assault and home invasion. Thus, Davis has not demonstrated prejudice from the failure to suppress the knife, much less the prejudice necessary for us to reverse his conviction.[5]

III. Prior Bad Acts Evidence

A. Standard Of Review

Davis contends that the trial court erred in allowing Davis's neighbor to testify to his prior bad acts. We review the trial court's evidentiary decision to determine if it abused its discretion.[6]

B. Intent

At trial, over Davis's objection, Koperta testified that following an argument in May 1999, Davis made "a gun motion with his hand" at her house, and said, "I'm going to shoot that fat bitch . . . and I'll burn her house down and have that lot, too." The trial court ruled that this evidence was relevant to Davis's intent to commit the assault and home invasion, and that its probative value was not substantially outweighed by the risk of unfair prejudice.

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character or behavior consistent with those other wrongs. However, this type of evidence is admissible if it is offered for a proper purpose,[7] "such as . . . intent,"[8] and its probative value is not substantially outweighed by unfair prejudice.[9] Davis claims that the prosecutor lacked a proper purpose in submitting this evidence and that the evidence was more unfairly prejudicial than probative, because the alleged statements related to arson and murder,

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[4] See *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997), citing *Weeks v United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914), and *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

[5] See *People v Bartlett*, 231 Mich App 139, 158-159; 585 NW2d 341 (1998).

[6] See *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

[7] See *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

[8] MRE 404b(1).

[9] See *Crawford*, *supra*.

not a knife assault, as was charged in this case. Yet, the statements revealed Davis's hostility toward his neighbor, which is relevant to proving that he intended to assault Koperta, and did not merely slip on the stairs.[10] Davis cites no authority for the proposition that earlier threats of assaultive conduct are admissible only to prove intent concerning later allegations of precisely the same assaults. Therefore, the trial court did not abuse its discretion in concluding that the earlier incident was probative of the question of Davis's intent in the charged conduct. Further, because the earlier threats were clearly hyperbole and there was substantial evidence other than these statements, the risk of unfair prejudice from admitting this evidence did not substantially outweigh its probative value.

IV. Rebuttal Evidence

A. Standard Of Review

Davis argues that the trial court erred when it failed, without a request or objection on the grounds now alleged, to prevent the prosecutor from eliciting testimony from a rebuttal witness that a defense witness was offered improper incentives to testify. We review this unpreserved issue for plain error affecting Davis's substantial rights.[11]

B. MRE 608(b)

Before opening statements, outside the presence of the jury, the prosecuting attorney reported to the trial court the possibility that one of the witnesses who had yet to testify would perjure herself, saying:

> It was brought to my attention that last night somebody called the Hazel Park Police Department regarding Ms. Cynthia Parenteau and informed the detectives that Ms. Parenteau has been paid to lie and fake a panic attack while testifying today. I did speak with that witness myself. I spoke with her over lunch time and she confirmed that that's what Ms. Parenteau had told her, that she had been paid to fake a panic attack and lie about what was said.
>
> She told me that she was served with a subpoena on Tuesday night and on Wednesday night met with [defense counsel], Ms. Kendle and the defendant's mother, and she had said she wasn't comfortable with lying but she would if the price was right.

Defense counsel replied, "Judge, indeed we met and no one . . . said anything to anybody about lying. I gave my usual instructions, you're under oath, you've got to tell the truth. . . . I don't know where this is coming from." The trial court advised the prosecuting attorney to take the appropriate action if she had evidence of perjury.

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[10] See, generally, *People v Morris*, 139 Mich App 550, 557; 362 NW2d 830 (1984).

[11] See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Later, Parenteau testified that she was with Davis and Kendle on the night of the incident with Koperta. According to Parenteau, Davis tripped on Koperta's porch and "fell into the screen or the aluminum door," so Kendle tried to help him. Parenteau indicated that Davis never had a knife, and did not slash at Kendle. On cross-examination, Parenteau noted that she had received her subpoena from Kendle while at Sandra Werdene's home. The prosecuting attorney asked, "Okay, and when you received your subpoena, you told Sandra Werdene that they wanted you to lie and fake a panic attack on the stand, didn't she, Ms. Parenteau?" This drew a defense objection that this was a collateral matter, which the court overruled because it was relevant to the witness' credibility. Parenteau denied saying any such thing to Werdene. Asked how much Davis's mother was paying her to testify, Parenteau answered, "Nothing."

After the defense rested, the prosecutor called Sandra Werdene as a rebuttal witness. Defense counsel objected that Werdene was not on the witness list, but the court overruled the objection because this was rebuttal testimony. Werdene testified that she knew Parenteau, that Parenteau was her own son's aunt, and that Parenteau lived with her for a time, that time "pretty much" included April 7, 2000. Werdene also explained that Parenteau and Kendle were at her house at the time Kendle gave Parenteau the subpoena, but Parenteau did not want to testify. Asked to elaborate, Werdene stated, "She said about testifying that they wanted her to go up on the stand and lie and fake a panic attack because she does have serious problems with panic attacks." Werdene added, "she said she really didn't want to do that but she was going to wait until . . . when she meet with" defense counsel and "from what I understand . . . that's what they wanted her to do, and [Davis's] mom had a little something for her for going and testifying." Defense counsel objected to this testimony as hearsay, but the trial court overruled the objection, reasoning that Werdene could testify to Parenteau's prior inconsistent statements to impeach her.

MRE 608(b) provides, in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . *may not be proved by extrinsic evidence*. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness . . . .[12]

By extrinsic evidence, this evidentiary rule means testimony provided by someone other than the witness,[13] such as a rebuttal witness.[14] As a result, and consistent with the plain language in this rule of evidence, this Court in *People v Leo*[15] explained MRE 608(b)'s logical effect on rebuttal testimony, saying:

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[12] Emphasis added.

[13] See Black's Law Dictionary (6th ed, 1990) ("extrinsic" means "[f]oreign" or "from outside sources").

[14] See *People v Taylor*, 159 Mich App 468, 489, n 29; 40 NW2d 859 (1987) ("Extrinsic evidence to impeach is, by its nature, rebuttal evidence.").

[15] *People v Leo*, 188 Mich App 417; 470 NW2d 423 (1991).

> Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut. *A prosecutor cannot elicit a denial during the cross-examination of a defense witness and use such denial to inject a new issue into the case.* Cross-examination cannot be used to revive a right to introduce evidence that could have been, but was not, introduced in the prosecutor's case in chief.[16]

Though *Leo* did not specifically mention MRE 608(b), it implicitly served as the basis for its decision because that evidentiary rule was at issue in the precedent *Leo* cited.[17]

Notwithstanding *Leo's* firm basis in the law, this Court reached a contrary result in *Powell v St John Hospital*,[18] in which it held that

> [e]vidence that shows bias or prejudice on the part of a witness is always relevant. Accordingly, testimony which touches the bias or interest of the witness is always admissible, and can be shown upon his cross-examination, and, if denied by him, can be proven on rebuttal.[19]

To reach that conclusion, the *Powell* Court looked to very early Supreme Court precedent holding that "[t]estimony . . . [that] touches the bias or interest of the witness, is always admissible, and can be shown upon his cross- examination, and, if denied by him, can be proven on rebuttal; the proper foundation being laid for such proof."[20]

This conflict between *Powell* and *Leo*, at first blush, creates something of a problem. Though we agreed with *Leo's* legal basis, our conflict rule[21] would have had *Powell* win the day because this Court issued *Leo* before November 1, 1990, and it issued *Powell* after that date. However, several important factors erode *Powell's* influence in this case. In particular, though *Powell* provided an interesting exploration into older case law, it did so without reference to MRE 608, perhaps to find support for a result that the unusual circumstances of that case seemed to demand, but which MRE 608(b) arguably would not permit.[22] In doing so, *Powell* tried to settle comfortably within the safe confines of the rule of stare decisis, which recognizes that even

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[16] *Id*. at 422 (citations omitted and emphasis added).

[17] See *People v Sutherland*, 149 Mich App 161; 385 NW2d 637 (1985).

[18] *Powell v St John Hospital*, 241 Mich App 64; 614 NW2d 666 (2000).

[19] *Id*. at 72-73.

[20] *Swift Electric Light Co v Grant*, 90 Mich 469, 475; 51 NW 539 (1892).

[21] MCR 7.215(I)(1).

[22] *Powell, supra* at 74.

ancient law from the Michigan Supreme Court is binding.[23] In actuality, however, this approach ignored the modern Supreme Court's deliberate decision to abandon this old precedent when it enacted MRE 608(b).[24] In other words, the Supreme Court's decision to enact MRE 608(b) superceded any of its previous decisions inconsistent with the plain language of the evidentiary rule.[25] Indeed, more recent Supreme Court decisions tend to confirm MRE 608(b)'s general prohibition against rebuttal testimony concerning collateral matters, like non-party witness credibility.[26] Thus, because we must follow the Supreme Court's statements on the law, *Powell* does not control this case and the trial court plainly erred in allowing Werdene to testify as a rebuttal witnesses solely to challenge Parenteau's credibility.

Nevertheless, an unpreserved plain error does not require reversal unless it affected a defendant's substantial rights.[27] The record leaves no doubt that the ample testimony from Koperta and the witnesses who were guests on the night in question most likely persuaded the jury to convict Davis. Werdene's testimony was inconsequential because Parenteau's strong denials and the absence of the panic attack she was allegedly supposed to fake at trial effectively neutralized the effect of Werdene's testimony. Additionally, because this error was harmless, Davis cannot demonstrate the prejudice necessary to reverse his conviction on the basis of his related argument that his counsel's failure to object to Werdene's testimony as improper rebuttal was, itself, ineffective assistance of counsel.[28]

V. Jury Coercion

A. Standard Of Review

Davis argues that the way the trial court conducted the trial coerced the jury to render a verdict against him. Because he failed to object to the trial court's conduct, we review this unpreserved issue for plain error affecting his substantial rights.[29]

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[23] See *Ratliff v General Motors Corp*, 127 Mich App 410, 416-417; 339 NW2d 196 (1983) ("This Court is bound by the doctrine of stare decisis and is powerless to overturn a decision of the Supreme Court.").

[24] See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 756-757; 641 NW2d 567 (2002) ("Although application of the doctrine of stare decisis is generally the preferred course of action by this [Supreme] Court for it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process, it is not an inexorable command.") (internal quotations and citations omitted).

[25] See, generally, *People v Hardiman*, ___ Mich ___; ___ NW2d ___ (2002), slip op at 11; MRE 1101(a) ("Except as otherwise provided in subdivision [b], these rule [of evidence] apply to all actions and proceedings in this state.").

[26] See, generally, *People v LeBlanc*, 465 Mich 575, 587-589; 640 NW2d 246 (2002).

[27] See *Carines*, *supra*.

[28] See *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1984).

[29] See *Carines*, *supra*.

B. Rushed Verdict

Davis takes issue with the trial court's comments to the jury at the beginning of the proceedings concerning the daily routine. The trial court informed the jury that court sessions normally ended at 4:30 p.m., but the proceedings might remain in session as late as 5:00 p.m. as a courtesy to a witness who might be able to finish testifying, avoiding the inconvenience of an additional day of testimony. During trial, the trial court put this policy into practice. After announcing that there would be no more testimony for the day, it decided to allow the witness who had been testifying to finish testifying, delaying the end of the day until 4:52 p.m. Davis contends that this environment, where time was a matter of consequence, effectively coerced the jury into convicting him by rushing its deliberations, as the trial court's exchange with the court clerk allegedly revealed:

> THE COURT: It's five o'clock. We'll let the jury go for the evening.
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> THE CLERK: Yes, your Honor.
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> THE COURT: They want five more minutes. You tell them that court stops at five o'clock sharp.
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> THE CLERK: Yes, your honor.
>
> THE COURT: We'll give them five minutes. Deputy, can you keep him up here for five minutes?
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> THE DEPUTY: Yes.
>
> THE COURT: We'll take a five minute recess. I don't mean six.

The trial court then recessed at 4:59 p.m., and reconvened at 5:03 p.m., at which time the jury announced that it had reached a verdict.

A trial court may not pressure a jury to accelerate its decision-making process by expressing dissatisfaction with the progress of deliberations and threatening to discharge the jury if it does not reach a verdict by a certain time.[30] Other improper pressure tactics include insisting that the jury reach a verdict within a particular round of deliberations, and threatening to keep the jury in deliberations for an excessive period of time.[31]

The incidents Davis references indicated nothing more than the trial court's reasonable desire to let the jury go home at 5:00 p.m., consistent with its earlier statements about the routine daily schedule. The jury was not present when the trial court announced a five-minute recess. As a result, it was impossible for the trial court's emphatic statement "I don't mean six" to affect the jury at all. Nor did the trial court ask the clerk to admonish the jury to hurry in any way. The

[30] See *People v Malone*, 180 Mich App 347, 352-353; 447 NW2d 157 (1989), citing *People v Strzempkowski*, 211 Mich 266; 178 NW 771 (1920).

[31] See *People v London*, 40 Mich App 124, 126-128; 198 NW2d 723 (1972).

jury, not the trial court, determined that five minutes would be adequate for its deliberations. The trial court simply indulged the jury's request. The trial court did not express dissatisfaction with the pace of deliberations, and the record suggests no reasonable possibility that the jury misunderstood that it could deliberate further, the next day, if it so desired. There was no error, much less error requiring reversal.

VI. Cumulative Error

Davis argues that we must reverse his conviction because the cumulative effect of all the trial errors denied him a fair trial. However, because we conclude that Davis has failed to demonstrate any prejudicial errors in this case, he was not denied a fair trial.[32]

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell

[32] See *LeBlanc*, *supra* at 591, n 12.