STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID SILVA, JR.,

Defendant-Appellant.

UNPUBLISHED
November 19, 2002

No. 223534
Lenawee Circuit Court
LC No. 99-008302-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349, second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of life imprisonment for the kidnapping conviction and seventy-five to 150 years' imprisonment for the second-degree murder conviction, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions stemmed from evidence that he, along with codefendants Jeffrey Diaz and Ramiro Silva, killed the victim in Michigan because of his alleged complicity in a theft of marijuana during a drug transaction. The victim was shot four times in the back and head areas. A farmer discovered the victim's body in a cornfield about 1-1/2 weeks after the victim was killed. Diaz, who pleaded guilty to second-degree murder pursuant to a plea agreement, testified against defendant at trial. The prosecution also presented the testimony of Yvonne Felder (formerly Yvonne Ybarra), who testified that she was defendant's girlfriend at the time the victim was killed. Yvonne testified regarding incriminating statements made by defendant and her out-of-state flight with defendant after news reports indicated that the victim's body had been discovered.

On appeal, defendant first argues that the prosecutor committed misconduct by vouching for Diaz's credibility during his examination of a prosecution police witness. Because defendant did not object to the testimony on this ground at trial, but instead objected only on the ground that the prosecutor improperly asked the *witness* to vouch for Diaz's credibility, we find that this issue was not preserved. "An objection based on one ground at trial is insufficient to preserve an appellate attack on a different ground." *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Accordingly, we review this issue for plain error affecting defendant's substantial rights.

People v Carines, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Examined in context, it is apparent that the prosecutor's questioning did not involve any argument or statement that could be construed as improperly vouching for the credibility of Diaz, who had not even testified yet. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). Rather, the purpose of the questioning was to elicit information about why the police officer took certain actions. Because the prosecutor did not elicit any details about what Diaz told the police witness, we conclude that plain error has not been demonstrated. Cf. *People v Wilkins*, 408 Mich 69; 288 NW2d 583 (1980); *People v Pawelzak*, 125 Mich App 231, 235; 336 NW2d 453 (1983). See also *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) (prosecutorial misconduct may not be based on a prosecutor's good-faith efforts to admit evidence).

Next, defendant argues that certain testimony by both Yvonne and Diaz was inadmissible under MRE 404(b). Because defendant did not object to the challenged testimony on this ground at trial, this issue is not preserved. Further, we hold that defendant has not shown plain error. *Carines*, *supra.* Although MRE 404(b)(1) embodies the general prohibition in MRE 404(a) that specific acts may not be used to prove a person's character to show conformance therewith on a particular occasion, it does not preclude the use of the evidence for other relevant purposes. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

Here, Yvonne's testimony regarding the acts of violence allegedly perpetrated against her by defendant was relevant to her credibility as a witness, which was a material issue at trial. Her relationship with defendant was one of the factual issues bearing on her motive to come forward with information that defendant made incriminating statements about the murder. "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which the disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Within limits, parties may present evidence assailing or supporting a witness' credibility. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). See also *People v Layher*, 464 Mich 756, 762; 631 NW2d 281 (2001), and *People v Daoust*, 228 Mich App 1, 13; 577 NW2d 179 (1998). Thus, Yvonne's testimony does not constitute plain error.

Defendant gives only cursory treatment to his claim that the prosecutor elicited inadmissible bad acts evidence from Diaz. Accordingly, we need not address this claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). We have considered, however, defendant's claim that the challenged testimony constituted inadmissible evidence of threats by defendant against Diaz. Once again, however, defendant has not established plain error because a defendant's threats against a witness are generally admissible. *Carines*, *supra* at 763; *People v Scholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). We similarly conclude that Yvonne's testimony concerning threats by defendant did not constitute plain error. In this regard, defendant's reliance on *Hardy v State*, 86 Tex Crim 515; 217 SW 939 (1920), is misplaced, because that case involved threats against the jury.

Next, we reject defendant's challenges to the validity of his habitual offender sentence for second-degree murder. Defendant's reliance on *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), as support for his position that the sentence is improper because he does not have a

reasonable possibility of actually serving the sentence is misplaced. The decision in *Moore* is no longer good law. See *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997); *People v Phillips (After Second Remand)*, 227 Mich App 28, 31 n 2; 575 NW2d 784 (1997), *People v Kelly*, 213 Mich App 8, 15-16; 539 NW2d 538 (1995). Further, because defendant was sentenced as an habitual offender and the offense was committed before January 1, 1999, neither the former judicial sentencing guidelines nor the current legislative sentencing guidelines are applicable. MCL 769.34(1); *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). Instead, we must determine whether defendant's sentence was an abuse of discretion. *Id.* at 324. The sentence must be proportionate to the seriousness of the crime and defendant's prior record. *People v Colon*, 250 Mich App 59, 65; 644 NW2d 790 (2002); *People v Compeau*, 244 Mich App 595, 599; 625 NW2d 120 (2001). Considering the egregious circumstances surrounding the victim's death, along with defendant's criminal history and demonstrated inability to conform his conduct to the law, we conclude that defendant's sentence does not violate the principle of proportionality. The trial court did not abuse its discretion in imposing a sentence of seventy-five to 150 years' imprisonment. Because defendant's sentence is proportionate, it is not unconstitutionally cruel or unusual. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Next, defendant argues, through both appellate counsel and in a supplemental brief filed in propria persona, that trial counsel was ineffective. Limiting our review to the testimonial record developed at the sentencing hearing and other facts of record, we find no basis for concluding that trial counsel was ineffective. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). If defendant had further proofs to support his claim of ineffective assistance of counsel, he should have presented them to the trial court when filing his post-sentencing motion for a new trial. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). We also note that this Court previously denied defendant's pro se motion to remand in order to pursue his claim that trial counsel was ineffective for failing to present an alibi defense. We likewise conclude that defendant has not established that a remand is warranted in order to further pursue this claim.

Alibi testimony is essentially testimony offered to place a defendant somewhere other than the scene of a crime. *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978). In this case, defendant's supplemental brief identifies the same three alibi witnesses, Felix Chevez, Rick Trevino, and defendant's sister, Soleda Silva, that were identified in defendant's motion to remand. However, Chevez was neither named in defendant's witness list in the trial court, nor identified by defendant at the sentencing hearing as a proposed alibi witness. Furthermore, there is nothing in the record to indicate that Felix Chevez or Soleda Silva could have provided an effective alibi for defendant. *People v McMillan*, 213 Mich App 134, 140-141; 539 NW2d 553 (1995); *People v Kelly*, 186 Mich App 524, 427; 465 NW2d 569 (1990). Additionally, there is nothing in the record before us indicating what Trevino would have testified to if called as a defense witness, other than claims made by defendant himself. Thus, defendant has not established that a remand is warranted. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant's remaining claims in his supplemental brief lack merit. First, the trial court did not abuse its discretion in admitting a photograph of the victim's body (exhibit number 6). *Mills, supra.* Second, the trial court's failure to sua sponte declare a mistrial after Diaz

mentioned that defendant had been in a penitentiary was not plain error. The reference was brief and unsolicited, and the trial court's instruction to the jury that it was to disregard the testimony, coupled with the information provided to the jury that defendant's prior incarceration did not involve a crime of violence, was sufficient to cure any prejudice. *Carines, supra* at 763; *People v Griffin*, 235 Mich App 27, 36-37; 597 NW2d 176 (1999). Third, MCL 775.7 did not preclude the prosecutor from calling Diaz as a witness. *Wilson, supra* at 357-358. Fourth, the trial court's instructions, examined in their entirety, sufficiently explained the jury's duty to reach a unanimous verdict and did not amount to plain error. *Carines, supra* at 763; *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Specifically, the jury was instructed that "[e]ach verdict for each count must be unanimous." The jury was not required to agree on every fact supporting the verdict. *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998); *People v Johnson*, 187 Mich App 621, 629; 468 NW2d 307 (1991). The instant case did not involve the type of alternative acts or risk of jury confusion addressed in *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald