STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH LEE BOYD,

Defendant-Appellant.

UNPUBLISHED
November 22, 2002

No. 234685
Macomb Circuit Court
LC No. 00-002982-FH

Before: Jansen, P.J., and Holbrook, Jr. and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated stalking, MCL 750.411i. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 15 to 30 years' imprisonment. He appeals as of right. We affirm.

Yvonne Stephens, the complainant in this case, testified that defendant repeatedly called and threatened her and her family over a period of time. Ms. Stephens' daughter, Kimberly Harris, at one time was defendant's girlfriend and gave birth to defendant's son. Shortly after the birth of their son, Ms. Harris took the child and moved back to her mother's house. Ms. Stephens claimed that while Ms. Harris was living in her home, defendant called excessively and threatened to kill them if he could not visit his child. Between June 9, 2000 and June 20, 2000, phone records revealed that 156 phone calls were made from defendant's home address to Ms. Stephens' home. Ms. Stephens estimated that defendant called between twenty to forty times a day.

On June 20, 2000, Ms. Stephens called the police after a window was broken in her home and she heard defendant making threats outside. While the police were at Ms. Stephens' home, defendant called several times and made threats towards Ms. Stephens and her family. Officer William Ross testified that he spoke on the phone with an individual who identified himself as Keith. During this conversation, Officer Ross stated that when he told Keith to stop calling. Keith responded that the police could not be there all the time. The police officers testified that Ms. Stephens appeared scared and upset on the night of this incident. Shortly thereafter, Ms. Harris and the baby moved to a domestic violence shelter. Ms. Stephens testified that defendant continued to make threatening phone calls even after Ms. Harris left her home.

I. Effective Assistance of Counsel

Defendant initially contends that his defense counsel was ineffective for failing to secure medical records and jail visitation logs for impeachment purposes. We disagree. Because defendant did not raise this issue before the trial court, our review is limited to error apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

As a general rule, a witness may not be impeached with extrinsic evidence on collateral or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). MRE 608(b) further provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking . . . the witness' credibility, other than conviction of a crime . . . may not be proved by extrinsic evidence." See also *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Rather, an attorney must simply accept a witness' response regarding a collateral matter. *People v LeBlanc*, 465 Mich 575, 589; 640 NW2d 246 (2002).

In this case, defendant claims that defense counsel should have impeached Ms. Harris with medical records relating to her drug use and with jail records showing the number of times she visited defendant in jail. However, defendant has failed to establish how this information was material to his guilt or innocence. We note that Ms. Harris admitted to using marijuana and visiting defendant three times in jail. Whether the records could reveal that she lied about these matters does not bear closely upon defendant's culpability for stalking Ms. Stephens. Thus, impeachment with the records would have been improper. See *LeBlanc*, *supra* at 589; *Lester*, *supra* at 273-274, 276. Furthermore, given the overwhelming evidence of his guilt, defendant has failed to show that the admission of this evidence would have altered the outcome of the proceedings. *Carbin*, *supra* at 600.

II. Request for Continuance

Defendant next argues that the trial court abused its discretion when it denied his request for a continuance. We disagree. A trial court's decision to grant or deny a continuance is reviewed on appeal for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

A motion for a continuance must be based on good cause. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). Important factors that this Court considers include whether the defendant: (1) asserted a constitutional right; (2) had a legitimate reason for asserting the right; (3) was negligent; and (4) requested previous adjournments. *People v Lawton*, 196 Mich App

341, 348; 492 NW2d 810 (1992). On appeal, a defendant is also required to demonstrate that he was prejudiced by the trial court's decision. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

The record shows that defendant requested a continuance to subpoena the record keeper, to authenticate the jail visitation records, on the third and final day of trial. However, because these records were inadmissible to impeach Ms. Harris, defendant has failed to show how he was prejudiced by the trial court's decision. See *id* at 201-202.

III. Prosecutorial Misconduct

Defendant also maintains that the prosecutor made a civic duty argument during opening statements and denigrated the defense during closing arguments. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Unpreserved constitutional error only warrants reversal if it is plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Defendant first alleges that the prosecutor improperly appealed to the jury's fear of crime. It is improper for prosecutors to resort to civil duty arguments that appeal to a jury's fears and prejudices. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). A civic duty argument injects issues into the trial that are broader than a defendant's guilt or innocence and encourages the jury to suspend its powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

During voir dire,[1] the prosecutor made the following statements to the jury:

> The judge told you the defendant is charged with the charge of aggravated stalking. . . . I will have the burden of proof of proving all the elements of this charge beyond a reasonable doubt. Again, aggravated stalking. *I'm going to ask this question unfortunately it happens a lot more than we think, but does anybody here ever feel that they've been a victim of stalking?* Does anybody in here know of anybody, not like charged in court, but just felt they were victims of stalking? [Emphasis added.]

Reviewing the prosecutor's statements in context, it appears that the prosecutor was properly questioning jurors about potential biases or experiences and that any reference to civic duty was innocuous.

To the extent defendant contends that the prosecution attempted to denigrate the defense during closing arguments, we find that this argument also lacks merit. While the prosecution

[1] We note that defendant erroneously states in his appellate brief that the prosecutor's statements were made during opening arguments.

may not suggest that defendant's counsel is intentionally misleading the jury, it is permitted to respond to comments by the defense counsel. See *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In this case, the prosecutor's brief comment that defense counsel was "making up and mischaracterizing testimony" did not improperly denigrate the defense. Rather, this was in response to defense counsel's characterization of the case as essentially a child custody dispute and that Ms. Stephens agreed that she would resort to similar actions to see her child. See *Watson, supra* at 592-593. Given the overwhelming evidence of defendant's guilt, we find no error requiring reversal. *Carines, supra* at 763-764.

IV. Other Acts Evidence

Defendant ultimately asserts that the trial court abused its discretion by admitting evidence of defendant's pending criminal charges. We disagree. This Court reviews a trial court's decision to admit or deny evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

Evidence of other crimes or acts is generally inadmissible to prove an individual's propensity to act in conformity therewith. MRE 404(a); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, such evidence is admissible to show "proof of motive, opportunity, intent, preparation, scheme, plan, . . . absence of mistake or accident . . . ." MRE 404(b). We evaluate the admission of other acts evidence by considering whether: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

In the case at bar, defendant specifically objected to the admission of evidence that he was charged with assaulting Ms. Harris on January 15, 2000. The prosecutor asserted that it was offering this evidence to show intent and absence of mistake in the event that defendant claimed he was not stalking Ms. Stephens but only trying to get his son back. At trial, defendant attempted to portray his telephone calls to Ms. Stephens as reasonable because of a custody dispute and that his threats were the result of frustration. Because defendant attempted to justify his actions in this manner, evidence of this assault was probative of defendant's intent and absence of mistake when calling Ms. Stephens.

While all relevant evidence is "prejudicial" to some extent, it is only when the prejudice *substantially outweighs* the probative value of the proffered evidence that the evidence should be excluded. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212; 539 NW2d 504 (1995). A review of the record does not indicate that defendant's assault charges so affected the jury that it ignored the evidence and convicted defendant on an improper basis. See *Vasher, supra* at 501-502.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper