

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JULIUS CURTIS WALKER,

Defendant-Appellant.

UNPUBLISHED

December 10, 2002

No. 229921

Washtenaw Circuit Court

LC No. 98-011576-FC

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316. He was sentenced to life imprisonment, without parole, and appeals as of right. We affirm.

The victim, defendant's wife and the mother of his four children, had recently moved from the marital home to live with her parents. The victim's friends and relatives had witnessed threats by defendant or learned of the threats from the victim. The victim arrived at the home of a friend and reported being struck and threatened by defendant on the day he acknowledged receipt of divorce papers. The next day, December 22, 1998, the victim was found stabbed to death in her vehicle. A hat found in the vehicle contained a hair belonging to defendant. It was estimated that the murder occurred between 7:40 and 9:40 a.m. Although defendant was scheduled to be on vacation, he was observed at work sometime after the estimated time of the murder.

I. Evidentiary Issues

Defendant raises several evidentiary issues on appeal. The decision to admit evidence is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

A.

Crystal Bell, a friend of the victim, testified that she earlier saw defendant holding a butcher's knife and shaking and pointing the knife at the victim. Defendant stated to the victim, "Don't make me O.J. your ass." Defendant alleges that this evidence was inadmissible under MRE 404(b) because it was offered only to prove that he acted in conformity with his bad

character. We disagree. The evidence was not offered for an improper character purpose under MRE 404(b), but rather, to show defendant's intent, and whether he had a scheme, plan, or system, all proper purposes under MRE 404(b). *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998); *People v Starr*, 457 Mich 490, 495-496; 577 NW2d 673 (1998). Furthermore, the probative value was not substantially outweighed by the danger of unfair prejudice. *Starr, supra* at 499. The trial court gave a limiting instruction, advising the jury that it could consider the testimony only to determine whether it evidenced intent, or a scheme, plan, or system. The trial court did not abuse its discretion in admitting this evidence. *Lukity, supra*.

B.

Defendant next alleges that the trial court erred by admitting testimony from Fannie Cook, who testified that the victim told her that defendant threatened to kill the victim and her brother if she did not come back to him. The trial court admitted the testimony as an excited utterance under MRE 803(2). Review of the record reveals that, before the evidence was received, defense counsel stated that he had no objection to the testimony when the trial court made inquiry. Thus, defendant affirmatively waived this issue. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

C.

Stacy Mack testified that, the night before the murder, the victim told her that defendant had just received the divorce papers. When defendant confronted her about the divorce papers, the victim reported that she was grabbed by her hair and told that defendant would kill both her and her boyfriend. Defendant alleges that the trial court erroneously admitted the victim's statements under the excited utterance exception to the hearsay rule. We conclude that the testimony was properly admitted under MRE 803(2). *People v Kowalak (On Remand)*, 215 Mich App 554, 557-558; 546 NW2d 681 (1996). The victim's statements arose out of a startling event, i.e., a physical altercation after defendant had received the divorce complaint. Furthermore, the victim made the statements in an agitated state and did not have time for contrivance or misrepresentation. Lastly, the statements related to the circumstances of a startling event. Thus, a sufficient foundation was established to admit the testimony under the excited utterance exception, and the trial court did not abuse its discretion. *Id.*

D.

The challenged statements made by the victim to witnesses during face-to-face or telephone conversations, expressing fear of defendant or apprehension about the divorce were admissible to show marital discord as a motive for murder. *People v Fisher*, 449 Mich 441, 452-453; 537 NW2d 577 (1995).

E.

We find no merit to defendant's claim that the trial court abused its discretion when it qualified Amy Coha as an expert witness in the area of domestic violence. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Review of the record reveals that Coha was qualified by education, training, and experience. *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995). Defendant's challenge to her qualifications based on recent experience was a proper subject of cross-examination and concerned the weight of the testimony, not admissibility. *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987). Also, Coha's testimony assisted the jury in understanding the victim's behavior relative to her relationship with defendant. *People v Peterson*, 450 Mich 349, 373-375; 537 NW2d 857, amended 450 Mich 1212 (1995). Accordingly, the trial court did not abuse its discretion in allowing the expert testimony.

F.

Finally, the trial court did not abuse its discretion when it permitted evidence that, a month before the victim was killed, defendant attempted suicide and told a police officer that he had "no reason to live anymore because his wife and children are leaving him." *Lukity, supra*. The evidence was relevant to the issues of premeditation, deliberation, marital discord, motive and intent. *People v Ortiz*, 249 Mich App 297, 301-303; 642 NW2d 417 (2002). The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403.

II. Prosecutorial Misconduct

Defendant next alleges that he was denied a fair trial because of prosecutorial misconduct. We disagree. Appellate courts review allegations of prosecutorial misconduct de novo, examining the pertinent remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A.

The record does not support defendant's claim that the prosecutor withheld evidence of another hair found in the cap that was recovered from the victim's van. Evidence of additional hair fragments was presented at defendant's first trial. Furthermore, a review of the record reveals that the prosecutor did not mischaracterize this testimony during closing argument.

B.

Viewed in context, the prosecutor did not make an improper burden-shifting argument during closing argument. *People v Fields*, 450 Mich 94, 111, n 21; 538 NW2d 356 (1995).

C.

We reject defendant's claim that the prosecutor "humanized" the victim in order to impermissibly appeal to the sympathy of the jury. Defendant did not identify specific examples of improper argument, but merely alleged that the trial was filled with improper references. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

D.

We also find that the prosecutor did not make improper references to the O.J. Simpson trial. Evidence was presented that defendant watched the trial daily on television and once made a threatening statement to the victim in reference to O.J. Simpson. Indeed, defense counsel made numerous references to O.J. Simpson and his trial during his voir dire of the jury. We conclude that the evidence was relevant and properly admitted at trial, MRE 401, and that the prosecutor's closing remarks were proper comments on and reasonable inferences from the evidence as it related to the prosecutor's theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

III. Transcripts

Defendant alleges that he was denied his right, as an indigent defendant, to receive and use at his retrial the transcripts from his first trial. Review of the record reveals that, immediately after the trial court declared defendant an indigent defendant, the transcripts were ordered to be prepared at public expense. Most of the transcripts from the first trial were filed before the start of the second trial. There is no indication that defendant moved for an adjournment to obtain all of the transcripts prior to commencing the second trial. There is no indication that defendant was denied any requested or necessary transcript. We also note that defendant's attorney had represented him at he first trial, and was familiar with all the evidence. In light of this record, we conclude that no plain error affecting defendant's substantial rights has been shown. *Carines, supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly