

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAN CHATMAN,

Defendant-Appellant.

UNPUBLISHED

November 20, 2003

No. 240853

Wayne Circuit Court

LC No. 01-009554-01

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316, and possession of a firearm during the commission of felony, MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction and life imprisonment for the murder conviction. Defendant appeals as of right, and we affirm.

A businessman observed a murder from the second floor of a building at approximately 11:00 p.m. in late May 1997. The businessman heard gunshots followed by a woman's scream. He then observed a man pour a substance on a body and then ignite the body. Although the businessman believed that he could identify the murderer, he did not select defendant, the victim's former boyfriend, during a line up. The victim's car was found a short distance from her body. The driver's side door was open, and her purse, containing money, and cellular telephone were found in the car. Defendant gave a statement to police that denied any physical contact with the victim during the relevant time period. Rather, defendant asserted that the two communicated by telephone that evening, but did not see each other. Charges were filed in 2001, after an acquaintance of defendant's, Craig Burns, came forward, alleging that defendant had confessed to committing the crime. Burns, a welder and self-proclaimed¹ assistant pastor, had been convicted of crimes in the past and had been accused of a crime by defendant's current girlfriend. Thus, the credibility of Burns' testimony was extensively attacked at trial. Also, family and friends of the victim testified regarding the couple's tumultuous relationship, break up, and threats of violence in proximity to the time of the murder. Defendant presented the

¹ There was no evidence of any formal training or rules of practice for Burns' denomination presented at trial.

testimony of his girlfriend and his girlfriend's mother to establish an alibi to the murder. Defendant was convicted as charged.

Defendant first alleges that his due process rights were violated when the prosecutor elicited testimony regarding defendant's request to speak to an attorney. We disagree. This information was revealed in a brief, nonresponsive answer by a police officer to the prosecutor's question and when the trial court instructed the officer to read the statement aloud. Defense counsel did not object or move to strike the answers or request a curative instruction. A party may not waive objection in the trial court and challenge the action as error on appeal because to do so would allow a party to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Furthermore, police officers may testify regarding admissions made prior to a defendant's exercise of his *Miranda*² rights to establish the end and beginning of an interrogation and to give a complete overview of the officer's testimony provided there is no undue emphasis on the subsequent exercise of *Miranda* rights. *People v McReavy*, 436 Mich 197, 215-216; 462 NW2d 1 (1990), citing *Rowan v Owens*, 752 F2d 1186 (CA 7, 1984). Review of the record reveals that the brief mention of defendant's request to speak to an attorney was not unduly emphasized and merely established the context of the conversation. Furthermore, defense counsel highlighted the fact that defendant voluntarily went to the police station, gave a statement denying involvement, and participated in a line up. Therefore, reversal is not warranted.

Defendant next alleges that his clergy-penitent privilege was violated. We disagree. By failing to raise this issue in the trial court, defendant may not now claim error. *People v Watkins*, 468 Mich 233, 235, 238-239; 661 NW2d 553 (2003).

Defendant contends that trial counsel was ineffective for failing to challenge Burns' testimony based on clergy-penitent privilege. We disagree. In order for a defendant to establish a claim that he was denied his constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303. Defense counsel's performance must be evaluated against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). When a defendant fails to move for a hearing or a new trial based on ineffective assistance of counsel, *People v Ginther*, 390

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Mich 436, 443; 212 NW2d 922 (1973), any review is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).³

Defendant failed to meet his heavy burden of demonstrating ineffective assistance of counsel. Burns testified that he was a welder and assistant pastor. However, he did not reveal his underlying training and the extent of time that he devoted to each discipline. Burns was not the pastor of the church at which defendant appeared; rather, Burns' father was the pastor. Additionally, Burns testified that the admission by defendant was accompanied by a threat against Burns and members of his family. There was no evidence that the rules of the denomination, see MCL 600.2156, would have required Burns to maintain his silence where a threat was levied against his family. Accordingly, the failure to raise this issue in the trial court is not a mistake apparent on the record and could be construed as trial strategy. *Rodgers, supra*.⁴ Furthermore, trial counsel's conduct did not deny defendant a fair trial where he was able to elicit testimony regarding Burns' prior convictions, his current criminal charges involving defendant's girlfriend, and the submission of the information to police years after the confession was given, but prior to the commencement of Burns' criminal trial. *Pickens, supra*.

Defendant next alleges that the trial court abused its discretion by allowing prior bad acts evidence and the prosecutor committed misconduct by eliciting this testimony that the trial court had excluded. We disagree. A trial court's decision to admit other acts evidence under MRE 404(b) will be reversed only where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). To admit MRE 404(b) evidence, it must be offered for a proper purpose, it must be relevant, the probative value of the evidence must not be substantially outweighed by unfair prejudice, and a limiting instruction may be provided upon request. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The examination of the probative value in light of any unfair prejudice is merely a balancing process. *People v Starr*, 457 Mich 490, 498; 577 NW2d 673 (1998). The rule seeks to avoid unfair prejudice, not prejudice that stems from the abhorrent nature of the bad act. *Id.* at 500. Although evidence of motive is not essential in a prosecution for murder, it is always relevant, and evidence of other acts to prove motive is admissible under MRE 404(b)(1). *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). Evidence of defendant's motive to commit the crime is relevant to establish identity, actus reus, and mens rea. *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000). A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We decide issues of prosecutorial misconduct on a case by case basis, reviewing the pertinent portion of the

³ Defendant's motion to remand for a *Ginther* hearing was denied by order of this Court on November 7, 2003.

⁴ We note that in the materials filed by defendant in his motion to remand, the statement by Burns given to the police is provided. Therein, Burns stated that defendant came to the church seeking to perform community service because he had been placed on probation. This undermines the allegation on appeal that defendant went to the church seeking absolution.

record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

We cannot conclude that the trial court's decision to admit this evidence was an abuse of discretion because it was relevant to establish motive and identity. *Sabin, supra*; *Rice, supra*. Furthermore, the trial court ruled it was holding a decision regarding prior acts evidence in abeyance and did not admonish the prosecutor that the elicited testimony was in contravention of the trial court's earlier ruling. Accordingly, this claim of error is without merit.

Lastly, we note that defendant raises two additional issues in a Standard 11 brief. Following de novo review of the evidence in the light most favorable to the prosecution, there was sufficient circumstantial evidence to allow a rational trier of fact to find defendant guilty beyond a reasonable doubt of the charged crimes. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). The additional claims of ineffective assistance of counsel could be construed as trial strategy or failed to establish that the outcome of the proceeding would have been different. *Toma, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ William B. Murphy
/s/ Janet T. Neff