

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER ALLEN LEVITT,

Defendant-Appellant.

UNPUBLISHED

September 22, 2009

No. 284879

Kalamazoo Circuit Court

LC No. 2007-001493-FC

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of felony murder, MCL 750.316(b), and sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises out of a larceny and murder at a launderette in Kalamazoo on August 7, 2007. The victim, an employee, was discovered during the early morning hours lying on the floor surrounded in blood with his throat slit and stab wounds to both his neck and lower back. He died a short time later.

Defendant first contends that the trial court erred in admitting testimony of his former girlfriend regarding a statement he made to her sometime before the murder occurred threatening to slit her throat and the throats of her parents. The trial court admitted the testimony pursuant to MRE 404(b) to show identity through modus operandi and to show common plan, scheme, or system.

This issue was properly preserved when defendant objected to the prosecution's notice of intent to introduce evidence under MRE 404(b), and the trial court addressed and decided the issue. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Whether evidence is admissible as a matter of law under the rules of evidence is reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court's decision to admit evidence under MRE 404(b) is reviewed for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court commits an abuse of discretion when it admits evidence that is inadmissible as a matter of law. *Katt, supra* at 278.

While evidence of a defendant's other acts must meet the requirements of MRE 404(b) to be admissible at trial, statements made by a defendant are not governed by this rule. *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). "A prior statement does not

constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act.” *People v Rushlow*, 179 Mich App 172, 175; 445 NW2d 222 (1989), quoting *Goddard, supra* at 518. Thus, whether defendant’s statement was properly admitted at trial involves the determination whether the statement was relevant pursuant to MRE 401 and whether the probative value of the statement was outweighed by the danger of unfair prejudice pursuant to MRE 403. See *Goddard, supra* at 515; *Rushlow, supra* at 176.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. In this case, the identity of the perpetrator was the quintessential issue at trial and defendant’s statement threatening his former girlfriend was relevant to this issue. Considering that the victim’s throat was slit, the threat revealed that defendant was willing to kill someone by slitting his or her throat, that he contemplated killing a person in that manner, or that he had knowledge of how to kill a person in that manner. See *Rushlow, supra* (evidence that the defendant threatened to kill the victim’s coworker minutes before the victim was murdered was relevant to show state of mind or a predisposition to commit the crime).

MRE 403 excludes admission of relevant evidence if the “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...” “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Crawford, supra* at 398. The probative value of defendant’s statement was not outweighed by the danger of unfair prejudice to him resulting from its admission into evidence. The evidence was highly probative of identity, and any prejudice resulting from its presentation was somewhat mitigated because the jury had been exposed to evidence showing defendant had specialized military training in methods to kill people using knives. Additionally, the prosecutor presented a substantial amount of other circumstantial evidence that would allow a rational juror to conclude beyond a reasonable doubt that defendant committed the murder, suggesting the jury did not give undue weight to the evidence. Finally, the trial court instructed the jury not to consider the threat as a reflection of defendant’s character. “[J]urors are presumed to follow their instructions.” *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

In sum, the trial court did not abuse its discretion in admitting evidence of defendant’s threatening statement. Although the trial court admitted the statement pursuant to the wrong evidentiary rule, “[a] trial court’s misidentification of the grounds for admission of evidence does not ... necessarily require overturning its decision to allow it.” *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992).

Defendant next contends that the prosecutor improperly referenced specific instances of defendant’s character when he recalled defendant’s former girlfriend to testify as a rebuttal witness. We have reviewed the merits of defendant’s unpreserved argument and find that, although the prosecutor improperly introduced evidence of specific acts during the rebuttal testimony, see MRE 404(a)(1) and MRE 405(a), the error did not affect defendant’s substantial rights because it did not affect the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). As stated above, the prosecutor presented overwhelming circumstantial evidence supporting the jury’s verdict, including two statements made by defendant that a rational juror could consider tantamount to confessions. Circumstantial

evidence and reasonable inferences arising therefrom can be sufficient to sustain a conviction. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

Defendant further contends that 10 separate instances of prosecutorial misconduct denied him his constitutional right to a fair trial. Defendant failed to preserve for review any of these alleged instances of prosecutorial misconduct. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). This Court reviews unpreserved challenges to prosecutorial statements for outcome-determinative, plain-error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.*, citing *Carines*, *supra* at 763. Moreover, this Court will not “find error requiring reversal where a curative instruction could have alleviated any prejudicial effect.” *Id.* at 329-330. The prejudicial effect of most improper prosecutorial statements can be cured by a curative instruction, and jurors are presumed to follow their instructions. *Unger*, *supra* at 235-236.

Defendant first alleges that the prosecutor acted improperly in introducing a police officer’s rebuttal testimony concerning defendant’s reputation for violence. Defendant’s argument lacks merit because he first introduced character evidence concerning his reputation for peacefulness. Thus, pursuant to MRE 404(a)(2) and MRE 405(a), the prosecutor was free to introduce this testimony to rebut defendant’s character witnesses.

Next, defendant asserts that the prosecutor’s form of questioning during cross-examination of defendant’s character witnesses was improper because the prosecutor asked about specific instances of defendant’s bad conduct by prefacing his questions with the phrase “are you aware,” instead of prefacing those questions with the phrase “have you heard” or “had you heard.” Defendant correctly observes that a prosecutor should avoid asking “are you aware” questions during cross-examination of a character witnesses because it suggests that the former misconduct is a fact. *People v Dennis Fields*, 93 Mich App 702, 709; 287 NW2d 325 (1979). However, on more than one occasion, the trial court instructed the jury that the attorneys’ questions were not to be considered as evidence. Thus, any prejudicial effect resulting from the form of the prosecutor’s questions was cured by the trial court’s instruction. *Unger*, *supra*.

Defendant also alleges that the prosecutor improperly referred to his failure to produce an alibi witness at trial. During police investigation, defendant informed police that he was at the laundrette on the night/early morning of the murder to meet a homosexual lover named James Kimble. After extensive investigation into the matter, police concluded Kimble was a fabrication. During his opening statement and closing argument, the prosecutor essentially informed the jury that defendant had failed to produce Kimble because Kimble was a fabrication. A prosecutor may not attempt to shift the burden of proof to defendant, and a prosecutor cannot comment on defendant’s failure in general to present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Because defendant did not advance a defense theory involving Kimble, and because defendant did not testify, the prosecutor’s comments were inappropriate. See *People v Carl Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, considering the overwhelming evidence presented at trial, defendant cannot show that the brief comments affected the outcome of the trial, or resulted in the conviction of an actually innocent defendant or “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Callon*, *supra*; *Carines*, *supra*.

Defendant next alleges that the prosecutor improperly encouraged the jury to convict based on sympathy for the victim. “[A] prosecutor may not appeal to the jury to sympathize with the deceased and his family.” *Abraham, supra* at 273. We agree that the prosecutor improperly interjected sympathy into the proceedings during his opening statement and closing argument. However, we conclude that this misconduct does not warrant reversal because the trial court instructed the jury not to consider sympathy in rendering its decision, because the statements involved were not extensive, and because there was an overwhelming amount of evidence introduced at trial from which a rational juror could have concluded beyond a reasonable doubt that defendant was guilty. *Callon, supra*.

Defendant also argues that the prosecutor interjected the prestige of his office into the proceedings by stating during closing argument, “we don’t reward people for being successful with their crimes.” While a prosecutor may not urge the jury to convict based on prestige of the office, *People v Matuszak*, 263 Mich App 42, 55; 687 NW2d 342 (2004), read in context, the challenged statement was merely an explanation that circumstantial evidence can form the basis for a conviction. There was no misconduct.

Defendant next asserts that the prosecutor improperly denigrated defense counsel during closing argument when he argued that defense counsel misstated the evidence, misstated the law, and was being paid to say he did not believe that the evidence showed that defendant was guilty. “A prosecutor cannot personally attack the defendant’s trial attorney because this type of attack can infringe upon the presumption of innocence.” *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, a prosecutor’s improper remarks may not warrant reversal when they are responsive to the defense counsel’s argument. *Id.* at 608. Here, the prosecutor’s statement that defense counsel misstated the evidence and the law was not inappropriate because it was made in response to defense counsel’s remarks during his closing argument. While it was inappropriate to refer to defense counsel as being paid to give his opinion, for the reasons discussed above, the remark does not constitute outcome-determinative, plain error and thus, does not warrant reversal. *Callon, supra*.

Next, defendant alleges that the prosecutor used prestige of the prosecutor’s office to bolster the credibility of one of the prosecutor’s witnesses. The prosecutor presented defendant’s cellmate, who testified that defendant said that he was at the laundrette on the night of the murder, and that he left and came back with “his boy” to “take care of business.” The prosecutor then presented as a witness his fellow assistant prosecutor who testified concerning a plea bargain offered to the cellmate. However, this witness did not vouch for the credibility of the cellmate by claiming, or intimating, that he had special knowledge regarding the cellmate’s truthfulness. Rather, he merely explained the circumstances surrounding the cellmate’s plea and sentence. Thus, his testimony was not improper. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Moreover, the prosecutor’s remarks during closing argument that the cellmate was credible were not inappropriate. “[A] prosecutor may argue from the facts that a witness should be believed.” *Id.* Here, the prosecutor did not allege that the government had special knowledge that the cellmate was telling the truth; instead he argued, based on the evidence, that the cellmate did not have motive to lie. There was no misconduct.

Finally, defendant contends that the totality of all of the errors in this case, including the alleged evidentiary errors, denied him his constitutional right to a fair trial. This Court reviews a cumulative error claim to determine if the combination of alleged errors denied defendant a fair

trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). “The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal.” *Id.* “In making this determination, only actual errors are aggregated to determine the cumulative effect.” *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). In order for this Court to reverse a defendant’s conviction on the basis of cumulative error, “the errors at issue must be of consequence.” *Knapp, supra* at 388. “In other words, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.” *Id.* “Thus, actual errors must combine to cause substantial prejudice to the aggrieved party so that failing to reverse would deny the party substantial justice.” *Lewis v LeGrow*, 258 Mich App 175, 201; 670 NW2d 675 (2003). In this case, the combined effect of the actual errors did not amount to “serious prejudice” that denied defendant his right to a fair trial or substantial justice, particularly considering that the prosecutor presented overwhelming evidence of guilt, that those few actual errors that did occur were not egregious, and that the trial court gave instructions that mitigated any prejudicial effect. *Knapp, supra* at 388; *LeGrow, supra*.

We affirm.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra