STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2010
v	No. 287303 Ontonagon Circuit Court
BRIAN PAUL VIAU, Defendant-Appellant.	LC Nos. 08-000007-FH 08-000008-FH

Before: K.F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of aggravated stalking, MCL 750.411i, and solicitation of assault with intent to do great bodily harm, MCL 750.84. Defendant was sentenced as a second habitual offender, MCL 769.11, to concurrent terms of 30 to 90 months' imprisonment. He appeals as of right. We affirm.

I. Basic Facts and Procedure

Defendant and complainant began dating in 2002. In 2004, the couple moved into a home purchased by complainant. Complainant testified that she eventually became dissatisfied with the way defendant handled confrontations and decided to end the relationship. Defendant's reaction to her decision to end the relationship frightened complainant, in part because he appeared very angry and threatened to hurt himself.

Complainant stayed with her sister, Marsha, for a several days following the break-up, during which time defendant contacted her by telephone several times; but complainant remained steadfast in her decision to end the relationship. She eventually quit taking defendant's calls. After that, defendant arrived unannounced and approached Marsha in her backyard. Complainant testified that she was frightened by defendant's unexpected appearance. Complainant refused to speak to defendant and he left at Marsha's request.

Complainant enlisted the aid of the sheriff's department to advise defendant to gather his belongings from her residence. When complainant returned home, she saw defendant had not collected his possessions and had left pictures of the two of them and love notes that she had written early in the relationship on the kitchen table. Complainant testified that the officer who accompanied her to the home indicated that the display on the kitchen table was disturbing and may indicate a possible murder/suicide.

Later that day, complainant was notified that defendant had been arrested for drunk driving, driving without a license, and having loaded firearms in his vehicle. She requested a personal protection order (PPO) and was granted one, which was to remain in effect for one year. After the PPO was issued defendant often contacted complainant's family members, especially her sister. Several months later, complainant reported defendant for violating the PPO by pacing back and forth in front of her home. Complainant was informed that defendant had agreed to leave town in order to avoid jail time for violating the PPO. After defendant left town he continued to write letters to complainant's family members, especially Marsha. Complainant testified that she found the letters disturbing and believed that they were intended for her even though they were sent to her sister. When the initial PPO expired, defendant wrote or sent cards to complainant several times. Complainant that she did not write defendant back or give any indication that she wanted further contact with defendant.

From October 2006 to April 2007 complainant took a traveling nurse position in Honolulu, Hawaii. When complainant returned to Michigan, she discovered defendant had also returned to the area. Complainant was frightened and surprised by defendant's return, given her understanding that defendant was not to return as part of the agreement to avoid jail time for his prior violation of the PPO.

Complainant sought a second PPO after defendant wrote a letter to her daughter, indicating that he wanted to resume his relationship with complainant and stating that he would never hurt complainant even though he could if he wanted to because he was a trained killer, referring to his past military instruction. Complainant was granted a renewed PPO, initially effective for three months. Defendant challenged the issuance of the second PPO and a hearing was held, resulting in the PPO being extended until July 1, 2008.

On September 18, 2007, defendant pleaded nolo contendere to a misdemeanor charge of stalking, MCL 750.411h, related to contacting Marsha. The judgment of sentence for this conviction indicates that he was given credit for 23 days spent in jail, with the remaining 67 days suspended. On September 20 2007, complainant reported to police that defendant had violated the PPO by staring at her for five minutes while she was in a restaurant. On September 20 or 21, Michigan State Police Detective Sergeant Timothy Doan received information "from Sheriff Gravier" that defendant "had attempted to hire someone to kill his ex-girlfriend and burn her house down."

During one of the times he was in jail, defendant became acquainted with Gregory Stella and Calvin LeBlanc. Stella testified that defendant spoke on several occasions of wanting bodily harm to come to his ex-girlfriend. Stella also said that defendant offered to take care of Stella's ex-wife if Stella were to hurt complainant for him. Stella reported these conversations to law enforcement and provided a written statement related to same, because he believed defendant's threats were serious. Stella also wrote a letter addressed "To whom it may concern," in which he recanted his prior statement. Stella stated that this letter was not true and that he had written it because defendant had threatened him.[1] LeBlanc, Stella's cellmate, testified that he had

[1] Defendant had written to Stella that unless he "withdraw or retract or change you [sic] statement . . . Im [sic] going to write a statement on you . . . . I'm not a Snitch but whats [sic] (continued…)

overheard defendant say that he wanted his girlfriend to disappear and that if she did there would be no evidence against him. LeBlanc also reported that he had provided a written statement to law enforcement regarding the conversations he overheard.

Several unsuccessful attempts were made to arrest defendant. Michigan State Police Trooper Timothy Rajala testified that he was involved in a search of the Village of Ontonagon for defendant that included going to his last known residence. Taped to the door of the residence, Rajala found a note addressed to "Greg" and signed "Brian" that read, "Im [sic] sorry Im [sic] not here like we talked about. I went to Houghton till Monday. Ill [sic] Call you when I get back." Ontonagon County Deputy Sheriff Donald Lorendo testified that he was in contact with defendant during this period by cell phone. Lorendo testified that defendant stated he was hiding, but that he had seen the officer at defendant's and another person's residence looking for defendant. Lorendo indicated that defendant said "that if he wanted to harm the girls at any point, he had the ability to do so." Defendant also contacted Jason Clinesmith, who reported that defendant said he was running from the police and that he would "'like to take a bat to the blanking Prosecutor.'"[2] Defendant was eventually captured.

At trial, defendant recounted his initial relationship with complainant and maintained that the relationship was very good until his drinking increased toward the end of their relationship. Defendant reported that he had trouble accepting the breakup and was suicidal for a time. He admitted that after he was arrested he engaged in "women bashing" with his cellmate, but denied saying that he wanted complainant hurt or killed. Defendant further testified that he might have stated that he wanted complainant out of the home, but denied stating that he wanted the house burned down. As mentioned, the jury convicted defendant of aggravated stalking and solicitation of assault with intent to do great bodily harm. This appeal ensued.

II. Improper Opinion Evidence

Defendant first argues that he was denied a fair trial when improper opinion evidence was admitted at trial.

A. Standard of Review

Defendant failed to object to the testimony he now argues on appeal was improperly admitted. Thus, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that (1) an error occurred, (2) the error was plain, and (3) the error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.* Moreover, even if all three requirements are satisfied, reversal is only warranted in cases where the error resulted in the conviction of an

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(…continued)

good for the Goose is good for the Gander" (Letter from defendant to Greg Stella, undated, admitted as plaintiff's trial exhibit 17).

[2] On petition by Ontonagon County Prosecutor James R. Jessup, a special prosecutor was appointed to handle these cases.

actually innocent defendant or the error seriously compromised the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

B. Analysis

Defendant specifically argues that two police officers provided testimony that was not properly supported, as well as invading the province of the jury by offering legal conclusions. We disagree.

Defendant first challenges the following statement made by deputy sheriff Lorendo. At trial, he was asked, "Now do you recall the conversation on August 21st of last year at [defendant's] residence?" During the answer, Lorendo stated, "And I explained my experience that a lot of times these types of things, when it continues as it does, escalates to a lethal point where there is a homicide . . . and/or a suicide." Defendant argues that this statement constituted improper expert testimony that was not adequately based on reliable principles and methods.

A nonrespsonsive answer to a proper question is generally not cause for granting a motion for mistrial. *People v Haywood*, 209 Mich App. 217, 228; 530 NW2d 497 (1995). However, because police officers "have a special obligation not to venture into forbidden areas of testimony which may prejudice the defense," *People v McCarver* (*On Remand*), 87 Mich App 12, 15; 273 NW2d 570 (1978), the impact of a nonresponsive answer provided by a police officer will be examined closely, *People v Page*, 41 Mich App 99, 199 NW2d 669 (1972). Here, Lorendo's testimony did not constitute expert or opinion testimony. Rather, Lorendo merely testified that during an interview or conversation with defendant he made the above statement to defendant to persuade defendant not to further contact complainant. Thus, defendant failed to establish plain error affecting his substantial rights.

We also reject defendant's argument that two police officers improperly testified as to legal conclusions at trial. Police officers are permitted to offer opinion testimony related to topics with which they have personal knowledge or experience, which does not rely on scientific, technical, or specialized knowledge. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988); see also MRE 701. The officers' testimony that defendant was a credible threat was based on their observations of defendant's conduct and its effect on complainant, as understood through the lens of their years of law enforcement experience. Consequently, the testimony was admissible under MRE 701.

III. Improper Bad Acts Evidence

Defendant next argues that evidence of prior bad acts was improperly admitted at trial. Specifically, defendant challenges evidence related to threats defendant made against the county prosecutor.

A. Standard of Review

This issue was also not properly preserved below, so review is again for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

B. Analysis

MRE 404(b) permits the introduction of other bad acts so long as it does not "risk impermissible inferences of character to conduct." *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001) (internal quotation marks and citation omitted). Permissible uses of other acts evidence includes "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b).

Introduction of evidence that defendant threatened the county prosecutor in a telephone call to a third party violated MRE 404(b). While the threat arose as a result of defendant's conduct toward complainant, which eventually led to charges being authorized, the threat did not shed light on defendant's motivation for his conduct toward complainant, nor was it relevant to the system or plan he employed to commit the charged offenses.

The disputed evidence was also not admissible under the alternative theory of res gestae. Evidence of other acts is admissible as part of the res gestae of the offense if the other acts are "so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (quotation marks and citation omitted). Defendant's threat to the prosecutor was tangentially related to the crime as a whole. However, defendant's threats against the prosecutor were not so entwined with his conduct related to complainant that it was necessary that the additional threats be included in the trial on the charges related to threats against complainant.

Nonetheless, reversal is not required. While defendant makes a conclusory statement that the error was not harmless because the jury considered the cited threat when it made its determination of defendant's guilt, defendant has not established that the error actually affected the outcome of the lower court proceedings, particularly in light of the overwhelming weight of the other evidence adduced. In addition, defendant has not established that the error resulted in the conviction of an actually innocent defendant or that the error seriously compromised the fairness, integrity, or public reputation of the judicial proceedings. Therefore, reversal is not required. *Carines*, 460 Mich at 763.

IV. Effective Assistance of Counsel

Defendant also argues that he was denied effective assistance of counsel because of counsel's failure to effectively address the above asserted trial errors. As discussed, the trial court did not err in allowing the officers' testimony cited on appeal as being inadmissible. Defense counsel has no obligation to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Similarly with respect to counsel's failure to object to testimony concerning the threat made against the county prosecutor, defendant has not established that but for the alleged error, a different result was likely or that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Further, defense counsel's failure to object to testimony about the threat may have been a strategic decision to avoid drawing the jury's attention to the testimony. See *People v Bahoda*,

448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Therefore, defendant's claim of ineffective assistance of trial counsel is without merit.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra