STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 2010
v	No. 287895 Saginaw Circuit Court
JAMES STEPHAN ZIMMERMANN, Defendant-Appellant.	LC No. 07-030108-FH

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of aggravated stalking, MCL 750.411(i), extortion, MCL 750.213, attempted unlawful imprisonment, MCL 750.349(b), and felonious assault, MCL 750.82. Defendant was sentenced to concurrent terms of 24 months for aggravated stalking, 84 to 240 months for extortion, 24 to 60 months for attempted unlawful imprisonment, and 24 to 48 months for felonious assault. Defendant was given 253 days' credit against each sentence. Defendant appeals as of right, and we affirm.

A. SUBSTITUTION OF TRIAL JUDGE

Defendant argues that he is entitled a reversal of his conviction because Judge Leopold Borrello was substituted as his trial judge in violation of MCR 6.440(A) and established case law. Because defendant failed to object to Judge Borrello's substitution below, we review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Pursuant to MCR 6.440(A):

> If, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to continue with the trial, another judge regularly sitting in or assigned to the court, on certification of having become familiar with the record of the trial, may proceed with and complete the trial.

In the present case, defendant's jury trial began on June 18, 2008, with Judge Robert Kaczmarek presiding. Following the third day of trial, due to a family emergency that required Judge Kaczmarek to leave the state indefinitely, Judge Borrello was appointed as a substitute judge. On June 25, 2008, Judge Borrello filed a certification that he had familiarized himself

with the record as required by MCR 6.440.[1] Prior to the start of the fourth day of trial, Judge Borrello, on the record, informed plaintiff and defendant of Judge Kaczmarek's situation and assured them that he had read the transcripts and some of the motions and that he was confident the case could proceed.

First, defendant argues that he is entitled to a new trial because Judge Borrello did not inform the parties of their options before proceeding with the trial, which defendant believes was either to proceed with the trial or have a mistrial declared. However, the plain language of MCR 6.440(A) does not require that the parties consent before the appointment of a substitute judge or before that judge can proceed with the trial. Nor does it require that the parties be offered any options in lieu of proceeding before the substitute judge. Rather, the plain language of the rule requires only that the prospective substitute judge certify that he or she has familiarized himself or herself with the record and before proceeding with the trial. MCR 6.440(A).[2] Judge Borrello fully complied with the court rule.

Defendant's second argument is that Judge Borrello's substitution entitles him to a new trial because it was contrary to the "general rule" identified in *People v McCline*, 442 Mich 127, 133; 449 NW2d 341 (1993). In that case, our Supreme Court quoted the dissenting opinion in *People v McCline*, 197 Mich App 711, 719-720 (JANSEN, J., dissenting); 496 NW2d 296 (1992), overruled in part by *McCline*, 442 Mich at 127, at length as follows:

> The general rule is that it is error requiring reversal to substitute a judge to preside over the remainder of a trial in which evidence was adduced while the original judge was presiding.
>
> The theory behind the general rule is that the second or substitute judge, not being familiar with the prior testimony or evidence, is not in a position to give the accused a fair and impartial trial as contemplated under the law. The only judge competent to instruct the jury is the one who heard the testimony, observed the demeanor of the witnesses and had an opportunity to form an opinion with respect to their credibility, and knows something about the "atmosphere" of the case. Another judge, without knowledge of such matters taking place during the trial and with no possibility of learning from the record all the attendant circumstances of the trial, is not qualified to properly charge the jury. [Internal citations omitted.].

While the facts of the instant case fall squarely within the general rule prohibiting the

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[1] Defendant's assertion that there was no certification is belied by the record, as the prosecutor attached to his appeal brief a copy of the filed certificate.

[2] Defendant's reliance upon *People v Hicks*, 447 Mich 819 (opinion by Griffin, J.); 528 NW2d 136 (1994), is misplaced. *Hicks* involved the substitution of the judge presiding over two bench trials. *Id*. at 823. As such, the applicable court rule to that case was MCR 6.440(B), not MCR 6.440(A), which is the applicable court rule in the instant case. MCR 6.440(B). Therefore, *Hicks* in not controlling, and accordingly, does not support defendant's argument.

substitution of a judge after jury selection and the presentation of evidence, *McCline*, 442 Mich at 133, *McCline* was not based on MCR 6.440(A). Indeed, the court rule did not exist at the time of the trial in *McCline*. And, even if there was lack of compliance with the court rule, "automatic reversals are not favored . . . ." *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995). Instead, the Legislature and the courts require a showing of actual prejudice before a party is entitled to reversal. MCL 769.26; MCR 2.613(A). In other words, if the court rule violation was harmless error, reversal is not required. *Bell*, 209 Mich App at 275. Any error in this case would have been harmless, and defendant has not shown that he was actually innocent or that any error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Third, the order assigning Judge Borrello as a substitute judge reflects that Judge Borrello was a visiting judge to the circuit. If it is, as defendant asserts, "unknown if the State Court Administrator properly assigned Judge Borrello to serve on this case or to serve in general in Saginaw County," any lack of clarity is the consequence of the matter not being timely raised below. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

B. MOTION TO QUASH AND DIRECTED VERDICT

Defendant argues that his due process rights were violated when the trial court denied his motion to quash the extortion charge. However, where the prosecutor presents evidence sufficient to prove defendant guilty at trial beyond a reasonable doubt, any error in the bindover is harmless. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

MCL 750.213 states in relevant part:

> Any person who shall . . . orally or by a written or printed communication maliciously threaten any injury to the person . . . with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony . . . .

The testimony established that defendant approached the victim with a crowbar in his hand and told her that he had it to make sure that she did not leave before he had finished talking to her. Although defendant did not specifically state what he would do with the metal crowbar if the victim did not comply with his request, given the nature of the object and the stated reason why he had it readily available, the possibility of physical injury to the victim was real. Based on the record, there was sufficient evidence for the jury to conclude that defendant impliedly threatened to injure the victim, and that defendant made that threat with the intent to compel the victim from doing an act, i.e., leaving the parking lot before he had finished talking to her against her will. Defendant's argument therefore fails.

C. CHALLENGES FOR CAUSE AND THE JURY ARRAY

Defendant argues that the trial court abused its discretion when it excused four prospective jurors for cause merely because the prospective jurors had been previously convicted of misdemeanor offenses. We disagree. Because defendant failed to raise this issue below, it

has been forfeited and our review is, therefore, only for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Generally, it is within the trial court's discretion whether to excuse a prospective juror for cause. *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004). However, "once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *Id*. The record reflects that the prosecutor challenged for cause the objected to jurors based on their criminal records pursuant to MCR 2.511(D)(10). As such, the trial court was without discretion to excuse the prospective jurors. *Id*.

Defendant also argues that the trial court's dismissal of the four prospective jurors was in error because they had been convicted of misdemeanors deprived him of his constitutional right to a fair and impartial jury. We review this unpreserved claim of systematic exclusion for plain error affecting substantive rights. *Carines*, 460 Mich at 763; *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003).

Criminal defendants are constitutionally entitled to an impartial jury that is drawn from a fair cross-section of the community. *People v Hubbard* (*After Remand*), 217 Mich App 459, 472; 552 NW2d 493 (1996), citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975).

> [T]o establish a prima facie violation of the fair cross-section requirement, a defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." [*Id.* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant has presented no case law or evidence to support his argument that persons with a criminal record are considered a distinctive group. It is only a violation of the "fair cross-section" requirement if the group excluded is a distinct group in the community, *Duren*, 439 US at 364, so defendant's argument fails.

D. EVIDENTIARY ISSUES

Defendant also argues that the trial court's failure to admit evidence that the victim had previously opened fraudulent bank accounts in someone else's name deprived him of his right to present a defense. According to defendant, because the evidence was admissible to show the victim's motive to lie and make false allegations against him, the trial court abused its discretion when it excluded the evidence at trial. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review de novo whether a defendant has been deprived the right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The trial court did not abuse his discretion when holding that the bank records were inadmissible. Although a witness's credibility is always relevant and a party is entitled to introduce evidence assailing witness credibility, a party does not have an absolute right to introduce every piece of evidence that might bear on a witness's credibility. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). "[T]he test is 'whether the evidence will aid the court or jury in determining the probative value of other evidence *offered to affect the probability of the existence of a consequential fact*.'" *Id*., quoting Weinstein & Berger, Evidence, ¶ 401[05], p 401-29 (emphasis by *Mills* Court). Even if the victim had opened up a fraudulent bank account in someone else's name, given the lack of any connection to the instant case or her relationship with defendant, the evidence would have a limited value, if any, in helping the jury determine the probative value of the other evidence offered at trial. Nor would such evidence have a tendency to show the victim had a motive to file false allegations against defendant, which is what defendant argues was the relevance of the evidence.

Defendant also argues that the trial court abused its discretion and deprived him of his right to present a defense when it excluded his alibi witness's bank records. The record reflects that while the trial court considered whether to admit defendant's alibi witness's bank records, it reserved its ruling on the matter until defendant actually sought to introduce the records. Our review of the record reflects that defendant did not make such an attempt. Thus, any error in the failure to admit the records cannot be attributed to the trial court.

Next, defendant argues that the trial court abused its discretion when it allowed the prosecutor to admit a letter allegedly written by defendant without proper authentication. It is a prerequisite to the admission of evidence that the party attempting to introduce the evidence prove its authenticity. MRE 901(a). MRE 901(b) states in relevant part as follows:

> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
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> (1) *Testimony of Witness With Knowledge*. Testimony that a matter is what it is claimed to be.
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> * * *
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> (4) *Distinctive Characteristics and the Like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.

Defendant's argument that because no witness familiar with defendant's handwriting testified that he wrote the letter, the trial court could not find that the letter had been properly authenticated is erroneous. A plain reading of MRE 901(b) reflects that there are numerous ways in which a document can be authenticated. Having reviewed the record, we agree with the trial court's findings that the letter had distinctive characteristics that suggested it was what the prosecutor purported it to be.

Defendant also argues that the trial court abused its discretion when it admitted the letter because the prosecutor had failed to establish a chain of custody. Even if we were to agree with defendant, it is well settled that gaps in chain in custody go to the weight afforded the evidence, not its admissibility. *People v White*, 208 Mich App 126, 132; 527 NW2d 34 (1994); see also *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991) (stating that "[i]t is axiomatic that proposed evidence . . . need [not] be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that our system trusts the trier of fact to sift through the evidence and weigh it properly."). We see no error requiring reversal.

E. PROSECUTORIAL MISCONDUCT

Defendant argues that he was deprived of his right to a fair trial when the prosecutor made several misstatements of the evidence during his opening statements. Again, we disagree. To the extent that defendant preserved this issue for appeal, we review his arguments de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). We review defendant's unpreserved claims for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Thomas*, 260 Mich App at 454. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Contrary to defendant's argument, the challenged comments made by the prosecutor during opening statements were proper based on expected testimony. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). The record reflects that, with the exception of the prosecutor's statements that defendant tried to suffocate the victim and that he had cracked the victim's e-mail account passwords, the prosecutor elicited testimony that supports the statements made during his opening. And even though there was no direct testimony that defendant either tried to suffocate the victim or cracked the victim's email accounts, it can be inferred from the victim's testimony that defendant might have done so. As for the former, the victim testified, "We had sex. And while he was laying on top of me he covered my mouth." The prosecutor cannot be faulted if the witness gave a less detailed answer that he was expecting. *Id*. Further, the jury was instructed that attorneys' statements were not evidence and could not be considered when deciding defendant's guilt. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that he was denied a fair trial when the prosecutor introduced other acts evidence without providing proper notice pursuant to MRE 404(b). During direct examination, the prosecutor elicited testimony from the victim that defendant had told her that she had AIDS because she had had an affair with another man. Given the context of the victim's testimony, defendant's comment would constitute a prior statement, not a prior act. Only testimony regarding other acts must meet the requirements of MRE 404(b). *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1998); *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989). Accordingly, the admissibility of defendant's statement was governed by general relevancy principles. Defendant does not argue that the testimony was otherwise inadmissible.

Lastly, defendant argues that his trial counsel was ineffective for failing to object to the aforementioned statements and conduct. Because the prosecutor's statements and questions were not improper, defendant's trial counsel was not ineffective for failing to object below. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

F. CUMULATIVE ERRORS

Defendant argues that the cumulative effect of the errors below deprived him of a fair trial. Because defendant has not demonstrated that any errors were committed at his trial, he is not entitled to relief. *People v Brown*, 279 Mich App 116, 146; 755 NW2d 664 (2008).

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray