STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2011
v	No. 295366 St. Clair Circuit Court
GARY LAVERNE KAUFMAN, Defendant-Appellant.	LC No. 08-001985-FH

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant Gary Laverne Kaufman appeals as of right his jury trial convictions of felonious assault, MCL 750.82, against Ana Brown, and misdemeanor assault and battery, MCL 750.81, against Tim Brown. Because none of the issues raised by defendant warrants reversal of his convictions and sentences, we affirm.

This case arises out of a violent altercation between neighbors resulting from a relatively long "property dispute" between defendant and his immediately adjacent neighbors, Tim and Josephina Brown. Fourteen witnesses were presented to the jury in the St. Clair Circuit Court over the course of this three-day trial. The witnesses all testified about a July 4, 2008, altercation between defendant and his girlfriend, Andrea Smith (who was the landowner), and neighbors Tim and Josephina Brown and their adult children, Ana and Cary Brown. No one disputed that the altercation occurred, so the focus at trial was over who instigated the fight and the extent of the fight. Given the verdict, it appears that the jury believed the Browns' version of the events that day.

On appeal defendant raises two arguments, both of which include challenges to the admission of testimony under the rules of evidence, and which are also couched as claims of ineffective assistance of counsel. We now turn to those arguments.

Defendant's first argument is that he was denied a fair trial when the trial court "allowed the prosecutor to improperly introduce evidence that Mr. Kaufman and his partner paid restitution to the victim's spouse from injuries stemming from the assault." The trial testimony of Tim Brown on direct examination by the prosecutor that defendant objects to is as follows:

> Q: In regards to what happened on July 4, did you see your wife being assaulted that day?

A: Absolutely.

Q: Okay. And after that assault was done and the police arrived, did you see any injury to her –

A: She had black – her, her eye was black and blue. Her face was bleeding. Her cheeks were bleeding. Her mouth, her dentures, were damaged. *Restitution was made on that*. She was beat up pretty bad. Her ribs. She went to the emergency room for, for all kinds of bruises on her back, her eyes and her mouth. She went to the family doctor and to the ophthalmologist and the dentist. [Emphasis supplied.]

The italicized sentence in the forgoing testimony is the testimony upon which defendant's first argument is made. Defendant argues that the testimony is inadmissible under MRE 409, which provides as follows:

> Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by injury is not admissible to prove liability for the injury.

Addressing defendant's evidentiary argument first, we initially note that this issue is unpreserved because there was no objection to the challenged evidence. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).[1] Accordingly, our review is limited to determining whether a plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Additionally, it is well-settled that admission of a voluntary and unresponsive statement does not ordinarily constitute error, *People v Kelsey*, 303 Mich 715, 717; 7 NW2d 120 (1942), and certainly does not warrant a mistrial unless there's evidence that the prosecutor knew in advance that the witness would give unresponsive testimony or that the prosecutor encouraged or otherwise conspired with the witness to provide the objected to testimony, *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990).

Here, defendant does not argue that either the witness or the prosecutor conspired to place this isolated comment, which was unquestionably unresponsive to the question asked, before the jury. Indeed, the testimony quoted above reflects that the isolated statement was unresponsive to the proper question asked, and was never brought up again. Thus, there was no plain error. Additionally, even if there was error, we would conclude that defendant's substantial rights were not affected by this testimony. For one, it was a single isolated statement amongst a vast majority of relevant, detailed testimony provided by Tim Brown. Additionally, Tim Brown did not testify that defendant and his girlfriend provided the restitution, he just testified that restitution was made. The fact that the statement does not specifically tie the restitution to

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[1] We also point out that defendant did not set forth in his brief on appeal whether these arguments were preserved in the trial court, despite his obligation to do so under MCR 7.212(C)(7).

defendant or his girlfriend substantially reduces any possible prejudicial effect. Accordingly, defendant's first evidentiary argument does not warrant the reversal of his convictions.

Defendant also argues that admission of this statement deprived him of his right to the effective assistance of counsel guaranteed by the state and federal constitutions. This assertion is also not properly preserved because defendant never moved for a new trial pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Review is limited to errors apparent on the record. *Id*. The standards governing an ineffective assistance of counsel argument were recently set forth by this Court in *People v Swain*, ___ Mich App ___, ___; ___ NW2d ___ (2010):

> The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963 Art 1, § 20, includes the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Here, we hold that defendant was not deprived of his right to the effective assistance of counsel when his counsel did not object to a short statement contained within an otherwise lengthy answer to a proper question when that one statement was unresponsive to that proper question. Indeed, defense counsel likely opted at that moment in trial not to object because to object would place greater emphasis on, and highlight to the jury, that one isolated statement. Applying the proper level of deference to trial counsel's decision made during the course of trial, we hold that defense counsel's failure to object to this statement did not deprive defendant of his right to the effective assistance of counsel.

Defendant's second argument also raises evidentiary and ineffective assistance of counsel claims, but is based upon several different pieces of evidence. The same standards of review apply to this set of defendant's challenges as they are equally unpreserved.

At issue are (1) a statement made by Tim Brown, that on the morning of July 4, before the altercation leading to the charges occurred, defendant threw horse manure at him and used profanities in referencing him, (2) a statement by Tim Brown that defendant spit in his face on that same occasion, and (3) a statement by defendant's adult daughter, Ana Brown, where she testified that her family had had prior altercations with defendant and that the police had advised them regarding those incidents.

The challenge put forth by defendant is that the forgoing testimony by Tim and Ana Brown were admitted (without objection) in violation of MRE 404(b) as impermissible prior bad acts evidence. We conclude, however, that the evidence was admissible under the "res gestae" exception to MRE 404(b) because the testimony about what occurred between defendant and one of the victims earlier that same day (and relating to the same subject matter), and on prior

occasions, was relevant evidence explaining the circumstances leading up to the crime. *People v Delgato*, 404 Mich 76, 83; 273 NW2d 395 (1978); *People v Bowers*, 136 Mich App 284, 294-295; 356 NW2d 618 (1984); *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978). The testimony of both these witnesses gave background evidence to the jury as to what had occurred between these same parties that same day and before, and which ultimately led to the altercation.

And, for many of the reasons already discussed, we hold that the admission of these statements – again all of which were unresponsive to the proper questions posed by the prosecutor – did not result from the ineffective assistance of counsel. Assuming a 404(b) objection to this evidence would have been successful, there could have been strategic reasons why defense counsel did not object. Again, objecting to unresponsive and isolated statements would have only highlighted those statements for the jury. Additionally, given the relevant evidence admitted which showed that the parties (who were neighbors) were antagonistic with each other to the point of physical altercation, the fact that "words had been said" earlier in the day was not sufficiently prejudicial to warrant a new trial.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto