STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2011
v	No. 293773 Kent Circuit Court
SID TERRELL JONES, Defendant-Appellant.	LC No. 08-011265-FC

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant Sid Jones appeals as of right his jury conviction for first-degree murder.[1] The trial court sentenced Jones as a fourth-offense habitual offender[2] to life without parole for the conviction. We affirm.

I. FACTS

On March 27, 2008, at approximately 5:00 a.m., the body of Janeanne Lusk was found in the parking lot of Viking Truck on Linden Street in Wyoming, Michigan. Lusk was a prostitute. Lusk's body contained three stab wounds: a superficial wound behind her right ear, one to her right arm, and one in the upper portion of the left side of her abdomen. Dr. Stephen Cohle, the forensic pathologist, testified that because there was a lack of blood from Lusk's wound to her abdomen, he opined that the wound to her abdomen was inflicted when she was nearly dead. A tissue was discovered in Lusk's vaginal area.

Officer Paul Pena, who is a police officer with the city of Wyoming, testified that he was one of the first officers to respond to the call that a body has been discovered. Officer Pena noticed a used condom near the victim, a broken cellphone, a lens from a pair of glasses, two shoes, and a cigarette butt on the scene. A second condom and a pair of glasses with the lens missing were also found at the scene. South of where the body was discovered, there was pooling of blood and some blood spatter, as well as what appeared to be a trail of blood leading

[1] MCL 750.316.

[2] MCL 769.12.

to the southwest around the building. On the southwest corner of the building, there was a pool of blood and broken glass, which appeared to be from a vehicle. There was blood in the glass. There was also blood smeared on the ground at that location. In addition, there was a trail of blood leading from the glass to a dumpster. Officer Kevin Meaney, who was a police officer with the city of Wyoming and who also responded to the scene, testified that he thought that the glass and blood evidence reflected a struggle or that someone was dragged.

Jacob Gomez, who worked for Viking Truck, recalled seeing a condom on March 26, 2008, in the parking lot. He indicated that the condom was not cleaned up. Gomez was aware that Viking Truck employees would smoke in the lot. Kenneth Horton, who also worked at Viking Truck, testified that on March 27, 2008, he observed the "huge quantity" of glass on the ground in the lot and indicated that it had not been there the previous day.

Laura Dykstra was a prostitute who testified that on March 25, 2008, she was working the streets when defendant Jones picked her up in a sport utility vehicle. They discussed having sexual intercourse. Dykstra and Jones arrived at the Viking Truck parking lot around "eleven o'clock or later." Jones told Dykstra that he had "$43 whole dollars," and Dykstra replied "[t]hat's fine." They both got into the back seat and had sexual intercourse using a condom. Dykstra did not see what Jones did with the condom afterwards, but she assumed that he threw it on the ground in the parking lot. They both got back into the front seat. Dykstra was subsequently getting dressed when Jones told her to get out. Dykstra saw Jones holding what appeared to be a switchblade knife. When Dykstra got out of the vehicle, she noted the license plate number as being "BCE 1403." Jones drove away. Dykstra did not call the police.

Dykstra was in the Kent County jail on March 27, 2008. After Deputy Melissa Frederick, who worked at the Kent County jail, was informed that a prostitute was killed the night before, she told Dykstra that she was lucky that she was not the person who was killed. Dykstra then informed Deputy Frederick about what happened to her on the evening of March 25, 2008. Dykstra subsequently found out that Lusk was the prostitute who was killed. Dykstra knew Lusk and smoked crack cocaine with her on March 25, 2008. Dykstra identified Jones in a photographic lineup and later at trial. Jones was charged with the felonious assault of Dykstra, but that charge was dismissed.

The DNA on both condoms found at the scene matched Jones's DNA. However, the tissue contained DNA of an unidentified male. The DNA of this unidentified male was also found on the outside of one of the condoms. David Hayhurst, who is a forensic scientist, theorized that most likely an unidentified male deposited sperm in Lusk's vaginal tract and the DNA of that male was then transferred onto the outside of the condom when another male was wearing the condom while later having sexual intercourse with Lusk. Upon a search of Jones's home, police found condoms that were the same type of condoms that they had found at the crime scene.

Jones's fiancée owned a Ford Escape. The license plate number on Jones's fiancée's vehicle was BCE 4103. Jones's fiancée indicated that Jones was driving her Ford Escape on the evenings of March 25, 2008, and March 26, 2008. Jones picked his fiancée up when she got out of work a few minutes after 12:00 a.m. on March 26, 2008, and March 27, 2008. When Jones picked up his fiancée at work a few minutes after 12:00 a.m. on March 27, 2008, she noticed that

the front passenger window was broken on her Ford Escape. Jones indicated that "some kid" broke the window by throwing a rock at it.

Jones testified at trial. Jones admitted to picking up prostitutes while driving his fiancée's vehicle. He also admitted to having sexual intercourse with Dykstra on March 25th. Jones indicated that he paid Dykstra $20, but she wanted more money. Jones asserted that Dykstra indicated that that was why she "don't date n------s." Feeling insulted, Jones stopped the vehicle and told her to get out. According to Jones, Dykstra told him that she was not going to get out, so Jones said, "You're going to get the f--k out right now." Dykstra then got out of the vehicle. Jones denied pulling a knife on Dykstra. Jones argued during trial that Dykstra lied about him possessing a knife so that she could provide valuable information on the case and thus become a trustee at the jail.

Jones admitted that he picked up Lusk on the evening of March 26th. He also admitted to having sexual intercourse with Lusk, using a condom, and discarding it. In addition, he admitted that the sexual intercourse with Lusk occurred at the same location as it did with Dykstra. Jones indicated that after he had sexual intercourse with Lusk, she got out of the vehicle and was standing outside making a telephone call on her cellular telephone. He subsequently rolled down his window and told her that he only had $15. Jones asserted that Lusk said "that's b---s--t" and yanked the vehicle's door, causing the window to smash. Jones admitted that a surveillance videotape showed him leaving the scene at 11:38 p.m. Jones then picked up his fiancée at work. He admitted that he lied about how the window was broken, but denied stabbing Lusk.

During trial, the prosecutor questioned an evidence technician with the Wyoming police department. She testified that she took photographs of Jones for the primary purpose of documenting whether he had any injuries and also to document Jones's stature. The technician indicated that when taking these photographs, only six days after Lusk was murdered, she did not note any injuries to Jones's body. During cross-examination, the technician confirmed that she did not notice any recent cuts, abrasions, scratches, bruises, or anything that appeared to have been the result of a scuffle or fight with another person.

As we stated above, Jones was convicted and sentenced for first-degree murder. Jones now appeals.

II. BAD-ACTS EVIDENCE

A. STANDARD OF REVIEW

Jones argues that the trial court erred in allowing the prosecutor to introduce evidence of his encounter with Dykstra, contrary to MRE 404(b). We review this unpreserved issue for plain error affecting Jones's substantial rights.[3]

[3] See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. LEGAL PRINCIPLES

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) when (1) the evidence is offered for a proper purpose, (2) the evidence is relevant, (3) and unfair prejudice does not substantially outweigh the probative value of the evidence.[4] Upon a defendant's request, the trial court may provide a limiting instruction to the jury.[5] Evidence is relevant when it has a "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."[6] If the evidence is offered to establish identification through a system in doing an act, (1) there must be substantial evidence that the defendant committed the bad act, (2) there must be some special quality or circumstance of the act tending to prove the defendant's identity or system, (3) the evidence must be material to the defendant's guilt of the charged offense, and (4) the danger of unfair prejudice must not substantially outweigh the probative value of the evidence.[7]

C. ANALYSIS

Jones argues that the evidence of his encounter with Dykstra was introduced merely to show his bad moral character, that it was irrelevant, and that the prejudice caused by admission of the evidence outweighed any probative value it might have had.

Contrary to Jones's contentions, the evidence was relevant to the issue of his identity as the person who stabbed Lusk. And for that reason, the evidence was admitted for a proper purpose: to establish his identity through a system in doing an act.[8] There was substantial evidence that Jones picked up Dykstra; drove her to the Viking Truck parking lot; had sexual intercourse with her; had a dispute over money; pulled a knife on her; and ordered her out of the vehicle. Based on the close similarities between the events that occurred with Dykstra and those that occurred with the victim, there was a special quality or circumstance of the act that tended to show Jones's system when picking up prostitutes. Jones engaged in an almost identical series of acts with Dykstra and the victim. Moreover, Jones denied that he possessed a knife when he was with Dykstra and denied stabbing the victim. Dykstra, however, testified that Jones brandished a knife during their encounter. Thus, Dykstra's testimony was material to contradict Jones's denials. In addition, the danger of undue prejudice did not substantially outweigh the probative value of the evidence. Jones was able to testify to his version of the events, and the jury was free to assess both his and Dykstra's credibility.[9] Dykstra's testimony was not "offered solely to

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[4] *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

[5] *Id.*

[6] MRE 401.

[7] *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982); *People v Smith*, 243 Mich App 657, 670-671; 625 NW2d 46 (2000).

[8] MRE 404(b)(1).

[9] See *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

show the criminal propensity of an individual to establish that he acted in conformity therewith."[10] Accordingly, there was no plain error when Dykstra's testimony was admitted into evidence.

III. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Jones argues that there were several instances of prosecutorial misconduct in this case. Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial.[11] But when defense counsel fails to object to the prosecutor's statements, we review those claims for plain error that affected the defendant's substantial rights.[12]

B. ATTACKING JONES'S CREDIBILITY

Jones argues that the prosecutor committed misconduct during closing arguments when he attacked Jones's credibility by, in effect, calling him a liar. In this case, the prosecutor argued from the evidence and reasonable inferences that Jones was not worthy of belief, which was proper.[13] Further, the prosecutor's closing argument supported his theory of the case.[14] Based on the foregoing, there was no plain error in the prosecutor's statements to the jury.

C. VOUCHING FOR DYKSTRA'S CREDIBILITY

Jones argues that the prosecutor committed misconduct by vouching for Dykstra's credibility. A prosecutor is not allowed to vouch for the credibility of his witness by inferring that he has special knowledge that the witness is testifying truthfully.[15] But a prosecutor may argue from the facts whether a witness is credible.[16] And "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes."[17] Therefore, the prosecutor's comments were not improper. They did not constitute improper vouching because the prosecutor did not assert special knowledge that Dykstra was testifying

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[10] *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993) (emphasis added).

[11] *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

[12] *Id*. at 453-454.

[13] *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

[14] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[15] *Id.* at 276.

[16] *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008).

[17] *Thomas*, 260 Mich App at 455.

truthfully.[18] In context, the prosecutor was arguing that the jury had to judge credibility and should base its judgment on the facts and circumstances.[19] Further, the prosecutor's comments that Dykstra had nothing to gain by testifying related to whether she was biased or had an interest in the case and, thus, were highly relevant to credibility.[20]

D. APPEALING TO JURY'S SYMPATHY

Jones argues that the prosecutor appealed to the jury's sympathy during closing arguments. A prosecutor may not make arguments that appeal to the jurors' sympathies.[21] Here, however, the prosecutor did not improperly appeal to the jurors' sympathies by stating that he was asking the jury to find Jones guilty on behalf of the victims.[22] This comment was isolated, not a blatant appeal for sympathy, and was not so inflammatory as to prejudice Jones.[23]

Moreover, the prosecutor did not appeal to the sympathy of the jury by stating "that [Dykstra] was kept in maximum security, couldn't wash her hair for ten days, couldn't get any soap for ten days, [and] couldn't get to the commissary for ten days." The prosecutor was simply explaining to the jury that Dykstra did not gain anything by her testimony, but rather was inconvenienced by being a material witness in the case. And a witness's interest in a case, or lack thereof, is highly relevant to credibility.[24]

In addition, the trial court's jury instructions were sufficient to cure any prejudice that might have resulted from the prosecutor's remarks.[25] "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions."[26] Accordingly, we conclude that there was no plain error affecting Jones's substantial rights.

E. CASTIGATING DEFENSE COUNSEL

Jones argues that the prosecutor committed misconduct during rebuttal argument by castigating defense counsel. Although he cites two page numbers of the trial transcript, Jones

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[18] *Thomas*, 260 Mich App 455.

[19] *Unger*, 278 Mich App at 240; *Thomas*, 260 Mich App at 454-455; *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995).

[20] *Coleman*, 210 Mich App at 8.

[21] *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988).

[22] *Id.*; *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987).

[23] *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

[24] *Coleman*, 210 Mich App at 8.

[25] *Bahoda*, 448 Mich at 281.

[26] *Unger*, 278 Mich App at 235 (internal citations omitted).

does not specify what the prosecutor said on those pages that supports his claim nor does Jones make any further reference to his assertion in his brief. In addition, Jones does not cite authority supporting his proposition. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."[27] Accordingly, we deem this argument abandoned.

F. REFERENCE TO PRIOR CONVICTIONS

Jones argues that the prosecutor's comments relating to Jones's prior convictions were improper when the prosecutor stressed that all the crimes were assaultive in nature, thus making it more likely that he, as a violent person, committed the murder in this case.

Defense counsel immediately objected to the prosecutor's reference to carjacking being a crime that uses force and violence, and the trial court essentially sustained the objection. Moreover, despite the fact that the prosecutor referred during rebuttal to Jones as being convicted of stealing by force, the trial court instructed the jurors that they "may only consider the evidence that has been properly admitted during the course of the trial" and that "the lawyers' statements and arguments are not evidence." The trial court also instructed the jury that they may consider Jones's prior convictions "only in deciding whether [they] believe the defendant is a truthful witness." In light of the trial court's curative instructions,[28] Jones was not denied a fair and impartial trial.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Jones argues that his defense counsel was ineffective for not objecting to admission of the evidence technician's photographs of Jones. Because this issue is unpreserved, we will consider Jones's claim only to the extent that defense counsel's mistake is apparent on the record.[29]

B. LEGAL PRINCIPLES

To establish ineffective assistance of counsel during trial, a defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable.[30] To establish that his trial counsel's performance was deficient, a "defendant

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[27] *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

[28] *Unger*, 278 Mich App at 235.

[29] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[30] *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

must overcome the strong presumption that defense counsel's action constituted sound trial strategy under the circumstances."[31]

C. ANALYSIS

It is well established that defense counsel's "[d]ecisions regarding what evidence to present . . . are presumed to be matters of trial strategy."[32] Here, defense counsel likely wanted the photographs admitted into evidence to show that Jones did not have any cuts, scrapes, or other injuries that might indicate that he was involved in a struggle with Lusk and thus killed her. Therefore, it is reasonable to presume that it was trial strategy for defense counsel not to object to their admission as a matter of defense strategy. And we will not second-guess defense counsel on matters of trial strategy.[33]

Moreover, we disagree with Jones's contention that the photographs were unnecessarily cumulative in light of testimony that Jones did not have any injuries on his body. Photographs are more effective than an oral description and thus photographs were not inadmissible simply because there was testimony reflecting that Jones did not have any injuries on his body.[34] Accordingly, we conclude that Jones has failed to meet his burden of demonstrating that defense counsel's performance fell below an objective standard of reasonableness.

V. JONES'S STANDARD 4 BRIEF

Jones raises several additional issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. PROSECUTORIAL MISCONDUCT

Jones argues that there were several additional instances of prosecutorial misconduct in this case that were not addressed in his brief on appeal. Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial.[35] But when defense counsel fails to object to the prosecutor's statements, we review those claims for plain error that affected the defendant's substantial rights.[36]

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[31] *Toma*, 462 Mich at 302.

[32] *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

[33] *Id.*

[34] *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972); *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod on other gds 450 Mich 1212 (1995).

[35] *Thomas*, 260 Mich App at 453.

[36] *Id*. at 453-454.

1. REFERENCE TO DYKSTRA AS "THE SURVIVING" OR "THE LIVING" VICTIM

Jones argues that it was unfairly prejudicial for the prosecutor to repeatedly refer to Dykstra as the victim who survived and as the living victim. We disagree. The prosecutor's comments related directly to the prosecutor's theory of the case that Jones was the person who murdered Lusk based on the similarity of his encounter with Dykstra. And "[p]rosecutors are . . . generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case."[37] Thus, there was no plain error as the result of these comments.

2. REFERENCE TO JONES'S SILENCE

Jones argues that the prosecutor committed misconduct by infringing on his right to be free from self-incrimination by referring to his failure to previously tell the detectives the version of events to which he testified at trial.

> In general, any reference to a defendant's post-arrest, *post-Miranda* silence is prohibited, but in some circumstances a single reference to a defendant's silence may not amount to a violation of *Doyle*[38] if the reference is so minimal that "silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference . . . ."[39]

Here, defense counsel objected to the prosecutor questioning Jones about why he had not told the detectives his version of the events. The trial court sustained the objection, noting in front of the jury that Jones had a constitutional right to remain silent in the face of any interrogation. Based on the foregoing, there was no *Doyle* violation in this case because Jones's silence was not submitted to the jury.

3. INFRINGEMENT OF RIGHT TO TESTIFY AT TRIAL

Jones argues that the prosecutor used the reference to Jones exercising his right to testify as an opportunity to weave and elude the facts of the case. Jones indicates that the argument infringed on his right to be present at trial.

Indeed, a defendant has a right to testify at trial.[40] However, we conclude that the prosecutor's comments were not improper because the prosecutor was simply arguing that Jones

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[37] *Unger*, 278 Mich App at 236.

[38] *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976).

[39] *People v Shafier*, 483 Mich 205, 214-215; 768 NW2d 305 (2009), quoting *Greer v Miller*, 483 U.S. 756, 764-765; 107 S Ct 3102; 97 L Ed 2d 618 (1987).

[40] MCL 768.3; US Const, Am VI, XIV; Const 1963, art 1, §§ 17, 20; *People v Fredericks*, 125 Mich App 114, 119; 335 NW2d 919 (1983).

was not worthy of belief and that he had the motive and opportunity to fabricate his testimony.[41] Hence, Jones was not denied a fair and impartial trial on this ground.[42]

4. REFERENCE TO PRIOR CONVICTIONS

Jones argues that the prosecutor's comments relating to Jones's prior convictions were improper under MRE 609 because the prosecutor referred to Jones's convictions as involving force or violence. However, as we concluded above, defense counsel's objection and the trial court's curative instructions cured any prejudicial effect.[43] Jones was not denied a fair and impartial trial.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Jones argues that there were other instances in addition to that presented in his brief on appeal where he was not provided the effective assistance of counsel. Because these claims are unpreserved, we will consider them only to the extent that defense counsel's mistakes are apparent on the record.[44]

1. FAILURE TO OBJECT TO PROSECUTOR'S REFERENCE TO DYKSTRA AS "THE SURVIVING" OR "THE LIVING" VICTIM

Jones argues that it was ineffective assistance of counsel for defense counsel to not object to the prosecutor repeatedly referring to Dykstra as the living victim when Jones was not on trial for his alleged conduct toward Dykstra. However, we have concluded above that the prosecutor's comments referring to Dysktra as the living victim were not improper. Because there was no error requiring reversal, defense counsel was not ineffective for not objecting to the comments.[45]

2. FAILURE TO REQUEST COLLECTION OF DNA EVIDENCE FROM OTHERS

Jones argues that trial counsel was ineffective for not requesting that DNA evidence be obtained from other people associated with the crime scene. Defense counsel's "[d]ecisions regarding what evidence to present and whether to . . . question witnesses are presumed to be matters of trial strategy."[46] "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of

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[41] See *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985).

[42] *Thomas*, 260 Mich App at 454.

[43] *Unger*, 278 Mich App at 235.

[44] *Jordan*, 275 Mich App at 667.

[45] *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

[46] *Garza*, 246 Mich App at 255.

hindsight."[47] Further, Jones does not produce any evidence to support his assertion that the potential DNA evidence may have been exculpatory. In addition, the jury heard the testimony that an unidentified person's DNA was found at the crime scene. Thus, any exculpatory value of the evidence was presented to the jury. Moreover, there was substantial evidence that Jones committed the crime. Accordingly, Jones cannot demonstrate that there is a reasonable probability that the results of his trial would have been different.

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens

[47] *Id.*