STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DAWUN EDWARDS,

Defendant-Appellant.

UNPUBLISHED
December 2, 2021

No. 351389
Berrien Circuit Court
LC No. 2018-000102-FC

Before: TUKEL, P.J., and K. F. KELLY and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and carrying a concealed weapon (CCW), MCL 750.227. He was sentenced as a fourth offense habitual offender, MCL 769.12, to 840 months to 120 years' imprisonment for the second-degree murder conviction, two years' imprisonment for each felony-firearm conviction, and 72 to 480 months' imprisonment for the felon-in-possession conviction and the CCW conviction. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from his murder of the victim, Novena Mathis, his "on and off" girlfriend of nearly 25 years and the mother of his two children, Dasha Mathis and Daquan Edwards in Benton Harbor, Michigan. When Dasha reached her early teen years, she alleged that defendant sexually abused her when she was five years old. As a result of the allegations, Dasha went to live with her maternal grandparents.

At the time of her death, the victim lived with defendant and Daquan, and the couple had a volatile relationship with allegations of domestic violence committed by both parties. Recently, on her cellular telephone, the victim reportedly recorded defendant engaged in drug sales. She purportedly advised defendant of the recordings and warned him that if he assaulted her, she would turn the videos over to the police.

The victim had recently agreed to allow Dasha, now grown and a mother of two young children, to move into her home. On the night of the victim's death, Dasha was in the process of bringing her children and her stuff into the victim's home. Defendant was present, became upset that Dasha and her family were moving in, and asked the victim to drive him to a nearby apartment complex. The victim agreed, but did not promptly return home or respond to her family's telephone calls and texts. Eventually, defendant answered his telephone and gave conflicting answers about the health and welfare of the victim.

Unbeknownst to the family, defendant apparently argued with the victim in the car and shot her in the face. Defendant pushed the victim into the passenger seat of her vehicle. He called his friend Marvin Phillips and had Phillips drive his own car and follow the victim's car to a nearby apartment complex. Defendant apparently attempted to hide the victim's vehicle and her body in the back of the complex near a dumpster. Phillips claimed to have no knowledge of the victim's death and thought that defendant was angry with the victim and merely sought to hide her vehicle as revenge. Defendant later asked Phillips to drive him to Kalamazoo where defendant's mother, Lenora Holliday, was staying at a hotel room. After defendant arrived at the hotel room, he struck Holliday with his gun, and Holliday stabbed defendant with scissors. Holliday called the police and was arrested for domestic violence. Defendant was hospitalized for the cut to his arm, but then arrested for his domestic violence upon Holliday in Kalamazoo.

In response to the missing person's report filed by the victim's family, Benton Harbor Public Safety officers were able to locate the victim's body following interviews with family and friends, including Phillips who led the police to the location of her vehicle and body. Police went to interview defendant in Kalamazoo. He initially was not forthcoming about details of the victim's death and posited that she committed suicide. However, after the police noted that the couple had a history of domestic violence, including that the victim had assaulted defendant with a small hatchet, defendant claimed that the shooting of the victim was committed in self-defense. He presented evidence that the victim had assaulted other people. Nonetheless, the jury rejected this theory, and defendant was convicted of second-degree murder and the weapon offenses.

II. ADMISSION OF OTHER ACTS EVIDENCE

Defendant alleges that the trial court improperly admitted the other-acts evidence of accusations of sexual abuse by Dasha, our prior appellate decision addressing this issue was wrongly decided, and this Court is not bound by the law of the case doctrine. We disagree.

The appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Edwards*, 328 Mich App 29, 41-44; 935 NW2d 419 (2019). An abuse of discretion occurs when the trial court's decision rests outside the range of reasonable and principled outcomes. *People v Baskerville*, 333 Mich App 276, 287; 963 NW2d 620 (2020).

In the trial court, the prosecutor filed a notice to admit other-acts evidence, specifically the allegations by Dasha that defendant sexually abused her as a child, and it was the subject of a motion hearing. The prosecutor submitted that the evidence was pertinent to defendant's motive to kill the victim after he learned that Dasha would be moving into the home he shared with the victim. Defense counsel argued that the evidence was unfairly prejudicial because it involved the

serious allegation of sexual abuse. The trial court concluded that the evidence had probative value, was not unfairly prejudicial, and was admissible.

Defendant filed an interlocutory appeal challenging the trial court's evidentiary rulings excluding evidence of domestic violence by the victim as well as the other-acts evidence of sexual abuse raised by Dasha. In a published decision, this Court reversed the evidentiary rulings pertaining to the victim, but affirmed the other-acts evidence issue as follows:

> Defendant also argues that the trial court erred by not excluding evidence of his alleged criminal sexual conduct against his daughter as inadmissible other-acts evidence under MRE 404(b). We disagree.
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> Other-acts evidence is governed by MRE 404(b)(1), which provides:
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> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
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> In [*People v Dobek*, 274 Mich App 58, 85-86; 732 NW2d 546 (2007)], this Court considered the admissibility of other-acts evidence and stated:
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> Evidence of other acts may be admitted under MRE 404(b)(1) if (1) the evidence is offered for a proper purpose, i.e., "something other than a character to conduct theory," (2) the evidence is relevant under MRE 402 as enforced by [MRE] 104(b), "to an issue or fact of consequence at trial," and (3) the probative value of the evidence is not substantially outweighed by its potential for undue or unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1295, 520 NW2d 338 (1994), citing and quoting *Huddleston v United States*, 485 US 681, 687, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988). With respect to the first two *VanderVliet* requirements, our Supreme Court in *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004), reviewing the law regarding MRE 404(b), stated:
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> In *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), this Court explained that the prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford, supra* at 387. Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded.

This Court explained that the proponent of the other-acts evidence must recite one of the purposes stated in MRE 404(b) and articulate how the evidence relates to the recited purpose. *Dobek*, 274 Mich App at 85.

In this case, the prosecution gave the trial court a reason to allow the admission of the evidence of defendant's sexual assault of his daughter when she was five years old. The prosecution explained to the trial court that the alleged sexual-assault evidence had nothing to do with defendant's propensity to commit the charged offenses but that the evidence's admission would establish that defendant had a motive for killing the decedent. The prosecution explained that: (1) on the day of the incident, the daughter moved into the decedent's home where defendant resided; (2) defendant became angry at the decedent for allowing the daughter to move into the home because the daughter previously alleged that defendant had sexually assaulted her and because he could not live in the same home with the daughter because of her previous allegations against him; and (3) defendant directed his anger at the decedent and killed her out of anger over the situation.

The record establishes that the prosecution recited one of the proper purposes stated under MRE 404(b) and explained how the evidence related to the recited purpose. The record supports the prosecution's explanation for admission. A detective testified at defendant's preliminary examination that defendant told him that his argument with the decedent centered on the daughter's moving into the house in light of the sexual-assault allegations she had made against defendant. Defendant told the detective that his argument with the decedent escalated to the point where defendant pulled out a gun and shot the decedent. Therefore, the prosecution proposed admission of this evidence to prove defendant's motive for the homicide, which is an acceptable purpose.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403. Under MRE 403, the trial court had to consider whether, although relevant, unfair prejudice substantially outweighed this evidence's probative value. The record reflects that the trial court applied the MRE 403 test and concluded that the evidence went to the issue of motive and could establish the fact that defendant became angry and that his anger was highly probative regarding the circumstances that led to the offense. The trial court further concluded that the anticipated testimony had significant probative value and stated that defendant could counter the evidence to balance any prejudicial effect. The admission of the evidence, like all inculpatory evidence, likely would be prejudicial to defendant, but the evidence's probative value respecting his motive for the shooting—an issue about which defendant and the prosecution disagreed vehemently—is not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion by ruling that evidence of the sexual assault would be admissible at trial. [*Edwards*, 328 Mich App at 41-44.]

Despite this Court's prior affirmance of the trial court's other-acts evidentiary ruling, defendant contends that the decision was erroneous and the law of the case doctrine should not apply.

The law of the case doctrine provides that if an appellate court has addressed a legal question and remanded the case for further proceedings, the determination of the legal questions by the appellate court will not be differently determined on a later appeal in the same case where the facts remain materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). The decision binds the lower court, and the lower court must take any action consistent with the appellate court judgment. *Id*. at 260. "Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Id*. (citation omitted). Generally, the law of the case doctrine is applicable regardless of the correctness of the prior decision. *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994). However, in criminal cases, the trial court is authorized to grant a new trial at any time when justice has not been done. *Id*.; MCL 770.1 ("The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs."). "Therefore, unlike in standard civil proceedings, in criminal cases the law of the case doctrine does not automatically doom the defendant's arguments or automatically render them frivolous and worthy of sanctions." *Herrera*, 204 Mich App at 341.

We disagree with defendant's contention that the *Edwards* decision, 328 Mich App at 41-44, was wrongly decided or caused justice to not be done. Other-acts evidence may be used to challenge a defendant's claim of self-defense or defense of others. *People v Denson*, 500 Mich 385, 399; 902 NW2d 306 (2017). "Other courts have recognized these theories of admission, and they are best understood as an attempt to rebut a defendant's claimed state of mind, that is, to show that a defendant did not have an honest and reasonable belief that his or her use of force was necessary to defend himself or herself or another." *Id*. Additionally, a claim of self-defense by a defendant renders his state of mind an issue. *Id*. (Citation omitted). Nonetheless, character evidence must be properly vetted by the appellate court and merely reciting a proper purpose for admission of evidence does not necessarily demonstrate the existence of a proper purpose. *Id*. at 400. "Rather, in order to determine whether an articulated purpose is, in fact, merely a front for the improper admission of other-acts evidence, the trial court must closely scrutinize the logical relevance of the evidence[.]" *Id*.

The trial court appropriately admitted the evidence that Dasha claimed that she was sexually abused by defendant. This information was not offered for the truth of the matter asserted, (i.e., to show that defendant committed criminal sexual conduct and was a bad actor), but to dispute defendant's claim that he acted in self-defense. At trial, the family dynamics were explained to the jury. Specifically, defendant and the victim had a long-standing "on and off" turbulent relationship that produced two children. When Dasha raised claims of sexual abuse, the allegations were investigated, but defendant was not charged. The victim did not seemingly support Dasha's allegations, Dasha was hurt by the victim's response, and she went to live with her maternal grandparents. However, in recent years, Dasha and the victim had repaired their relationship, and the victim agreed to let Dasha and her two young children move into the victim's home that she shared with defendant and Daquan.

The victim's agreement to Dasha's living arrangement seemingly reflected another step in the victim's attempt to separate from or end her relationship with defendant. The victim advised defendant that she had recorded him engaged in drug transactions and threatened to take the recordings to the police and the prosecutor. Defendant admitted to the police that he had no intention of living with Dasha because of her prior false allegations of abuse, gathered his things, and had the victim drive him to the apartment complex where he allegedly sold drugs. Thus, while defendant claimed that the victim had injured him with a hatchet months earlier and that he feared the victim, the prosecutor theorized that Dasha moving into the couple's home was the final straw in the unraveling of the couple's relationship. In effect, the victim was no longer subject to the control of defendant. The victim was gainfully employed, had a home, had recordings of defendant's drug deals and threatened to release them, and allowed Dasha to move into the couple's home apparently aware that defendant would not live with Dasha in light of her prior allegations. Thus, this evidence was not used to show that defendant was a bad actor who committed acts of criminal sexual conduct. Rather, the evidence was offered to rebut defendant's claim of self-defense and demonstrate that the victim took action to eliminate defendant's power over her which angered defendant (i.e., state of mind) to the point that he killed her. Because the evidence was pertinent to defendant's claim of self-defense, was not offered for an improper purpose, was merely premised on Dasha's allegations that were investigated and not charged, and a limiting instruction was provided, the prior *Edwards* decision, 328 Mich App at 41-44, correctly determined the other-acts evidence was admissible.

Regardless of the application of the law of the case doctrine, "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990 that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." MCR 7.215(J)(1). The *Edwards* decision, 328 Mich App at 41-44, was rendered after 1990, was not reversed or modified by our Supreme Court, and was not the subject of a conflict panel. Therefore, it remains binding precedent. Accordingly, this claim of error does not entitle defendant to appellate relief.

III. FORFEITURE BY WRONGDOING

Defendant contends that the trial court improperly admitted evidence that the victim recorded defendant engaged in the sale of drugs on her telephone under MRE 804(b)(6), the codification of the doctrine of forfeiture by wrongdoing. We disagree.

The appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Edwards*, 328 Mich App at 34. An abuse of discretion occurs when the trial court's decision rests outside the range of reasonable and principled outcomes. *Baskerville*, 333 Mich App at 287. Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Under MRE 804(b)(6), a statement is not excluded by the hearsay rule if the declarant is unavailable and the "statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

Thus, a defendant can forfeit his right to exclude hearsay by his own wrongdoing. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. . . .
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> The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong . . . . [*People v Jones*, 270 Mich App 208, 212-213; 714 NW2d 362 (2006) (Citations omitted).]

"The forfeiture doctrine not only provides a basis for an exception to the rule against hearsay, it is also an exception to a defendant's constitutional confrontation right." *Burns*, 494 Mich at 110-111. "[T]he forfeiture doctrine requires that the defendant must have specifically intended that his wrongdoing would render the witness unavailable to testify." *Id*.

> To admit evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the defendant's unavailability; and (3) the wrongdoing did procure the unavailability. [*Id*. at 115.]

The timing of the wrongdoing is not a determinative inquiry. However, "it can inform the inquiry: a defendant's wrongdoing *after* the underlying criminal activity has been reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability." *Id*. at 116 (Emphasis in original). The inferences differ contingent on whether intent relates to already-charged conduct or whether a homicide case is presented. *Id*. at 116 n 38. The trial court may act as a fact-finder to determine questions of fact that pre-determine the admissibility of the evidence. MRE 104(a); *Burns*, 494 Mich at 117 n 39.

In light of the above, we reject defendant's challenge to the admission of the evidence that the victim reportedly recorded defendant engaged in drug transactions and conveyed that information to her father and Daquan. First, the fact that the trial court made a preliminary finding of fact regarding admissibility of the evidence did not violate defendant's rights; there is a distinction between a preliminary question of admission and the ultimate determination of guilty beyond a reasonable doubt by the jury. Additionally, defendant's contention that the evidence could only be used in a drug prosecution is also without merit. The *Burns* Court noted that when there are existing charges, the analysis of defendant's intent to discourage a witness's testimony is easier. Nonetheless, the plain language of MRE 804(b)(6) provides that a statement is not excluded as hearsay if the declarant is unavailable and the statement is offered against a party that has engaged in wrongdoing intended to procure the unavailability of the witness. The plain language of the rule of evidence addresses when the evidence is admissible and contains no prohibition on the type of litigation in which the statement may be admitted.

Finally, to admit this evidence, the prosecutor had to show by a preponderance of the evidence that defendant engaged in wrongdoing, the wrongdoing was intended to procure the declarant's unavailability, and the wrongdoing did procure the unavailability. In the present case,

defendant was taken to a hospital and then into custody because of an incident of domestic violence with Holliday. While defendant was in Kalamazoo, the victim's body was discovered. Consequently, when defendant was interviewed and declined to make a statement, the interviewing detectives volunteered that they were aware of the couple's volatile relationship. At that time, defendant disclosed that he shot the victim in the face (engaged in wrongdoing) and this wrongdoing did procure the victim's unavailability. It should be noted that defendant attempted to negate the intent requirement, that the wrongdoing was intended to procure the declarant's unavailability, by claiming that he acted in self-defense. However, defendant also disclosed that he was angry with the victim because she had advised that she recorded his drug deals and moved Dasha into the couple's home which necessarily meant that defendant had to leave because he refused to live with Dasha in light of prior allegations of sexual abuse. Thus, defendant provided both positive and negative evidence of his intent to eliminate the victim. Under the circumstances, defendant's challenge to the admission of this evidence under MRE 804(b)(6) is without merit.

Defendant's alternative contention that the drug dealing constituted improper MRE 404(b) evidence is also without merit. First, the evidence was not challenged on this basis in the trial court, and defendant failed to demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The evidence was offered to show motive and to negate defendant's state of mind that he acted in self-defense. Furthermore, defendant only challenges the evidence offered by the victim's father and Daquan, and he does not contest the cumulative testimony offered by Dasha and the victim's sister. Thus, this argument fails.

IV. RIGHT OF ALLOCUTION

Lastly, defendant submits that the trial court improperly denied defendant the right to allocute before the trial court imposed sentence. We disagree.

Generally, the appellate court reviews the interpretation and application of the court rules de novo. *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). Defendant did not raise this issue in the trial court, and therefore, this unpreserved issue is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 763; *People v Bailey*, 330 Mich App 41, 66; 944 NW2d 370 (2019). "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *People v Lockridge*, 498 Mich 358, 392-393; 870 NW2d 502 (2015). The requirement that the error was plain generally requires a showing of prejudice such that the error affected the outcome of the lower court proceedings. *Id*. Even if the plain error criteria are satisfied, the appellate court must exercise discretion in determining if reversal is warranted. *Id*.

The right of allocution permits a defendant to request mitigation of the sentence, to accept responsibility, and to begin the process of atonement. *People v Petty*, 469 Mich 108, 119-120; 665 NW2d 443 (2003). In *People v Berry*, 409 Mich 774, our Supreme Court held that there must be strict compliance with the court rule permitting allocution and required "the trial court to inquire specifically of the defendant separately whether he or she wishes to address the court before the sentence is imposed." However, the *Berry* decision was overruled in part by *People v Petit*, 466 Mich 624; 648 NW2d 193 (2002). In *Petit*, our Supreme Court granted leave to determine

"whether defendant must be resentenced because the trial court did not specifically ask defendant if she wished to allocute, that is, speak on her own behalf." *Id*. at 625.

In *Petit*, the defendant was charged with the first-degree murder of her sister, but was allowed to plead no contest but mentally ill to second-degree murder and felony-firearm. As a result of the agreement, it was determined that the defendant would be sentenced to 16 ½ to 40 years for second-degree murder and two years' imprisonment for the felony-firearm conviction. Our Supreme Court further wrote:

> At the sentencing hearing, defendant's attorney allocuted on defendant's behalf. The court also heard from the victim's daughter. Although the court asked if there was "anything further" before it imposed sentence pursuant to the agreement, and defense counsel specifically responded, "No, Judge," the court did not specifically ask defendant if she had anything to say on her own behalf before the court sentenced her.
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> Defendant argues that this failure violated MCR 6.425(D)(2)(c), and thus she is entitled to be resentenced.
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> MCR 6.425(D)(2)(c), the court rule that defendant alleges the trial court violated at sentencing, provides in relevant part:
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> At sentencing the court, complying on the record, must:
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> * * *
>
> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence . . . .
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> As is apparent, this straightforward rule requires the trial court to provide a defendant an "opportunity" to address the court before the sentence is imposed. At issue here is whether defendant had such an opportunity. We conclude that she did.
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> It is well established that we interpret the words of a court rule in accordance with their "everyday, plain meaning." *CAM Construction [v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 554, 640 NW2d 256 (2002)] quoting *Grievance Administrator v Underwood*, 462 Mich. 188, 194; 612 NW2d 116 (2000). "Opportunity" is commonly defined as:
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> 1. an appropriate or favorable time or occasion. 2. a situation or condition favorable for attainment of a goal. 3. a good position, chance, or prospect, as for success. [*Random House Webster's College Dictionary* (1995).]
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> Accordingly, this court rule means that the trial court must make it possible for a defendant who wishes to allocute to be able to do so before the sentence is

imposed. However, in order to provide the defendant an opportunity to allocute, the trial court need not "specifically" ask the defendant if he has anything to say on his own behalf before sentencing. The defendant must merely be given an opportunity to address the court if he chooses.

In this case, although the court did not specifically ask defendant if she wished to allocute, it did ask if there was "anything further?" and defense counsel said, "No, Judge." While it is unclear to whom this question was addressed, it is clear that defendant's counsel responded to the court's inquiry by indicating that there was, in fact, nothing further to say. At this juncture, defendant had the option, that is, the opportunity, of addressing the court, and she was not precluded or prevented from doing so.

In our judgment, the trial court's failure to specifically ask defendant if she had anything to say did not violate MCR 6.425(D)(2)(c) because this rule simply does not require such a personal and direct inquiry. It is noteworthy that some of our court rules do require the court to personally address the defendant, see, e.g., MCR 5.941(C) (requiring the court to "personally address the juvenile"); MCR 6.302(B) (requiring the court to "speak[] directly to the defendant"); MCR 6.402 and MCR 6.410 (requiring the court to "address[] the defendant personally"). To give meaning to those instances where our court rules require the court to directly address the defendant and to those rules, like that at issue here, where they do not, we conclude that MCR 6.425(D)(2)(c) only requires that the opportunity to allocute be given. Accordingly, in our judgment, the trial court here complied with the rule by generally asking if there was "anything further."

We are reinforced in our conclusion that we have given the proper reading to MCR 6.425(D)(2)(c) by reference to the United State Supreme Court's handling of a similar matter in *Green v United States*, 365 US 301; 5 L Ed 2d 670; 81 S Ct 653 (1961). *Green* arose out of a dispute concerning an analogous federal rule covering sentencing in the federal courts. In *Green*, the trial court asked, "Did you want to say something?" 365 US at 302. As in our case, it is unclear to whom this question was directed. However, also as in our case, it is clear that it was the defendant's counsel who responded to the court's inquiry.

Faced with the claim that these trial court proceedings were not in compliance with FR Crim P 32(a), the United States Supreme Court first noted that "if Rule 32(a) constitutes an inflexible requirement that the trial judge specifically address the defendant, e.g., 'Do you, the defendant, Theodore Green, have anything to say before I pass sentence?' then what transpired in the present case falls short of the requirement." 365 US at 303. However, the Court ultimately concluded that such a personal and direct inquiry is not necessary to provide the defendant with an opportunity to allocute. Accordingly, the Court provided, "we do not read the record before us to have denied the defendant the *opportunity* to which Rule 32(a) entitled him. The single pertinent sentence--the trial judge's question 'Did you want to say something?'--may have been directed to the defendant and not to

> his counsel." 365 US at 304 (emphasis added). On these facts, the Court concluded that the judge's question afforded the defendant a sufficient opportunity to allocute, and thus the court rule was not violated. [*Id*. at 627-630.]

MCR 6.425(D)[1] governs the sentencing procedure and provides in pertinent part:

> (1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:
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> * * *
>
> (c) *give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence* [Emphasis added.]

In the presentence investigation report (PSIR) for this offense, the probation officer wrote that defendant engaged in high risk behavior, attempted to justify his criminal behavior, refused to accept responsibility, and minimized the seriousness of his criminal activity. With regard to the PSIR's section entitled "Defendant's Description of the Offense," defendant provided the following statement:

> "Based on the advice from my attorney regarding the pending appeal in this matter, I will not be making a statement regarding this offense for purposes of the presentence investigation."

Defendant filed a lengthy sentencing memorandum with the trial court before any hearing was held. Additionally, before the trial court sentenced defendant, defense counsel requested that the court strike that portion of the PSIR that cited to a lack of remorse. Defense counsel noted that the probation officer's opinion addressing a lack of remorse was rendered after a limited interview over a video phone system, and it contradicted defense counsel's experience with defendant after spending hundreds of hours together. Further, defense counsel noted that he expressly apprised defendant not to make a statement about the case to the probation officer in the event there was a successful appeal and subsequent proceedings held in the trial court. The trial court agreed that the probation agent's conclusion that there was a lack of remorse was premised on conjecture, and defendant had a right to remain silent that existed throughout the appellate process. Therefore, the trial court removed the lack of remorse statement from the PSIR.

After the trial court's statements, defense counsel addressed jail credit. Three members of the victim's family were then permitted to give impact statements. The family members criticized defendant for not showing any remorse in court and for failing to even look at the victim's picture during the trial. Following the family members, the prosecutor made her statement. Defense counsel then made a statement for the record, and the transcript seemingly indicates that defendant stood with his counsel during the statement in light of defense counsel's request that they be

[1] Before January 1, 2021, this court rule was found at MCR 6.425(E)(1)(c).

allowed to stand at the podium. Defense counsel generally responded to the family's claims, but noted that he did not want to get into a "back and forth" exchange. Defense counsel ended his statement by indicating that is "all I have," and defendant did not make a statement.

On appeal, defendant contends that he was deprived of the right of allocution. We disagree. In the first instance, when interviewed for the PSIR, defendant expressly declined to give a statement addressing his description of the offense premised on the advice of counsel. Next, when defense counsel addressed the contents of the PSIR at sentencing, he objected to the inclusion in the report that defendant did not express remorse. Defense counsel cited to the fact that defendant may be pursuing a claim of appeal, and defense counsel expressly advised defendant not to state anything about the case for that reason. The trial court agreed that defendant did not have to make a statement and struck that portion of the PSIR.

Finally, when defense counsel gave his allocution to the trial court, he asked for permission to approach the podium with another individual, and we can surmise that it was defendant. The trial court questioned whether the court reporter could hear "them" from their location. Defense counsel minimally responded to representations made by the family to avoid going "back and forth" over the case. Defense counsel then submitted comparable sentences of other defendants convicted of the same offense. He requested that the trial court sentence defendant to allow him to be paroled in light of his age and his health. At the conclusion of his statement, defense counsel stated "that's all I have[.]" Thus, it is apparent that defense counsel expressly advised defendant not to give a statement seeking mitigation in light of the possibility of an appeal and, in turn, a remand back to the trial court. Indeed, when defendant was interviewed by the police, he initially declined to make a statement, but then admitted that he was angry with the victim for allowing Dasha to move into the couple's home in light of her prior allegations of sexual abuse and acknowledged drug dealing. Defense counsel may have purposefully advised defendant not to allocute in order to prevent repercussions if an appeal was pursued and successful. Further, a statement by defendant might have made things worse for his situation, as it did when he gave a statement to the police.

Finally, this issue is reviewed for plain error affecting substantial rights. "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *Lockridge*, 498 Mich at 392-393. The requirement that the error was plain generally requires a showing of prejudice such that the error affected the outcome of the lower court proceedings. *Id*. Even if the plain error criteria are satisfied, the appellate court must exercise discretion in determining if reversal is warranted. *Id*.

In *Bailey*, 330 Mich App at 66, the defendant pleaded guilty and used his allocution at his first sentencing hearing to profess his innocence. He was permitted to withdraw his plea, but was convicted, following a bench trial, of murdering the drug dealer who sold him poor quality narcotics. At his second sentencing, the trial court expressly inquired if defendant had anything to say before sentencing. However, after defendant began to apologize to the victim's wife, the trial court interjected and admonished that murder was an inappropriate way to address a "bad deal." This Court held that defendant was not afforded a "meaningful opportunity for allocution" when the trial court interrupted defendant almost immediately and without justification. It further concluded that plain error was established because the "error likely affected the outcome of the

proceedings in that [the defendant] was not given an opportunity to inform the trial court of 'any circumstances' that he believed the trial court should consider when crafting and imposing the sentence." *Id*. at 66-68.

Unlike in *Bailey*, plain error was not met in this case. Specifically, defendant was required to show that an error occurred. Defendant only demonstrated that the trial court did not expressly invite defendant to allocute. However, the record does not establish that defendant was deprived of the "opportunity" to allocute. Curiously, defendant minimally did not present an affidavit from his co-counsel to validate the assertion that the trial court failed to permit allocution by defendant and the omission did not reflect a strategic decision by the defense. Thus, defendant failed to show that an error occurred, that it was plain (clear or obvious) and that it was prejudicial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael F. Gadola

Tukel, P.J., not participating.