

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN DAVIS,

Defendant-Appellant.

UNPUBLISHED

March 15, 2012

No. 300426

Wayne Circuit Court

LC No. 09-029968-FH

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful imprisonment, MCL 750.349b, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 2 to 15 years for the unlawful imprisonment conviction and 2 to 4 years for the felonious assault conviction, to be served consecutive to a 2-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was convicted of assaulting and unlawfully imprisoning Kristopher Delbridge on May 25, 2009, in Detroit. Defendant was acquitted of additional charges of unlawful imprisonment and felonious assault related to Kristopher's cousin, Keenan Delbridge, in connection with a separate incident that allegedly occurred on May 23, 2009. The prosecution's theory at trial was that defendant, a supervisory deportation agent with the Department of Homeland Security ("DHS"), used his position as a federal agent to unlawfully obtain information involving a theft at his mother's Detroit home on May 20, 2009. Evidence at trial indicated that as Kristopher Delbridge was leaving a neighborhood store, defendant exited his government-issued Chevy Tahoe SUV, approached Kristopher, drew his government-issued firearm, forced Kristopher to sit on the ground, and prohibited Kristopher from standing or leaving as he questioned him. During the episode, defendant demanded the location of the suspected thief. Kristopher denied any knowledge of the suspected thief's whereabouts, but used his cell phone to call the suspected thief's mother, gave the phone to defendant, and defendant spoke to the mother. Unbeknownst to the parties, a portion of the episode was captured on the store's outside video surveillance camera. The defense asserted that defendant was verbally threatened when he approached Kristopher, prompting defendant to draw his firearm, but the threats were not apparent from the surveillance video because it did not contain any audio. The defense also argued that Kristopher and Keenan Delbridge were admitted marijuana users, that

they were associated with a gang known as the East Jeff Boys, and that neither was a credible witness.

I. RIGHT TO TESTIFY

Defendant first argues that his convictions must be reversed because the trial court effectively denied him his constitutional right to testify when it ruled that if he testified, the prosecutor could submit evidence of his past professional misconduct.¹ The evidence in question involved defendant's use of his government position to improperly allow an immigrant into the United States because defendant was involved in a sexual relationship with the immigrant's sponsor. The prosecution moved to admit the evidence under MRE 404(b). After a hearing on the motion, an order was entered, which provided in relevant part:

IT IS HEREBY ORDERED AND ADJUDGED that the prosecution is precluded from utilizing said evidence relative to the [immigrant] . . . incident in the prosecution's case, but is not precluded from utilizing the same in answer to the defendant's defense in rebuttal, and the prosecution is not precluded from bringing up inconsistent statements previously made by the defendant, if the defendant takes the stand during the course of trial[.]

We initially note that the first part of the order referencing rebuttal relates to defendant's defense and not solely to any testimony by defendant. The trial court's order merely provided that the prosecutor could elicit testimony regarding the immigration matter to rebut any evidence submitted by defendant as part of his defense and that the prosecutor could elicit testimony concerning the immigration matter to impeach defendant on any inconsistent statements should he take the stand. Defendant inaccurately treats the trial court's ruling as if it allowed for the admission of testimony on every aspect of the immigration matter based simply on a decision by defendant to take the stand; the order is not so broad.²

¹ A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Any underlying questions of law related to the admissibility of evidence are reviewed de novo. *McDaniel*, 469 Mich at 412.

² We note that our Supreme Court has held, in the context of impeachment by prior convictions in relationship to preservation, that to preserve the issue concerning impeachment, a defendant must in fact testify, or the defendant must have expressed his intention to testify had the court not ruled that the prior convictions would be admissible to impeach, along with outlining the nature of the proposed testimony. *People v Finley*, 431 Mich 506, 526; 431 NW2d 19 (1988). Given our ultimate ruling on this issue, we find it unnecessary to determine whether the preservation rule from *Finley* should apply here.

In *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996), our Supreme Court discussed the nature of rebuttal evidence, observing:

Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. Because the scope of rebuttal is based on the trial judge's discretionary authority to preclude the trial from turning into a trial of secondary issues, it is the trial court that must, of necessity, evaluate the overall impression that might have been created by the defense proofs. . . .

* * *

Rebuttal evidence is admissible to “contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.” The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.

Contrary to the dissent's insinuation, *the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant.* [Citations omitted; emphasis added.]

Rebuttal evidence must concern an issue that is relevant and material, i.e., it cannot pertain to collateral matters, and it must be excluded where the probative value of the rebuttal evidence is substantially outweighed by the danger of unfair prejudice, MRE 403. *Id.* at 399; *People v Hernandez*, 423 Mich 340, 349-353; 377 NW2d 729 (1985).

MRE 613³ provides the authority for impeaching a witness through prior inconsistent statements. “A defendant’s false or inconsistent testimony may be impeached.” *People v Cross*, 202 Mich App 138, 144-145; 508 NW2d 144 (1993).

³ MRE 613 provides:

(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness.

(b) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. . . .

Defendant launches into an exhaustive other acts analysis under MRE 404(b); however, the trial court excluded the evidence regarding the immigration matter from being presented in the prosecutor's substantive case-in-chief. As indicated in *Figures*, 451 Mich at 399, the test concerning the admissibility of rebuttal evidence is not whether it could have been admitted in the prosecutor's case-in-chief, but, instead, whether the evidence is "properly responsive to evidence introduced or a theory developed by the defendant." Defendant fails to adequately address whether the immigration matter could be delved into for purposes of rebuttal or impeachment. We find no abuse of discretion relative to the trial court's decision that aspects of the immigration matter could be explored in rebuttal or for purposes of impeachment; therefore, defendant was not deprived of his right to testify. Given the posture of this case, it is impossible for us to determine, had defendant testified, whether any particular rebuttal or impeachment testimony allowed by the court would be permissible, assuming that the prosecutor would seek to inject testimony on the immigration matter. We are not prepared to rule that in no circumstance whatsoever could aspects of the immigration matter be introduced for purposes of rebuttal or impeachment.⁴ Moreover, depending on the nature of the examination, defendant conceivably could have testified without implicating the prosecutor's right to rebut or impeach based on a prior inconsistent statement. For example, defendant could have taken the stand and simply testified that Kristopher Delbridge threatened him outside the neighborhood store. Reversal is unwarranted, as defendant was not denied his constitutional right to testify.⁵

II. ADMISSION OF OTHER ACTS EVIDENCE

Defendant next argues that the trial court abused its discretion when it also allowed the prosecutor to introduce evidence under MRE 404(b) that defendant misused his homeland security vehicle and government-issued firearm during the alleged offenses. Again, we disagree.

Although the prosecutor and the trial court analyzed the admissibility of this evidence under MRE 404(b), we conclude that the evidence was admissible as part of the *res gestae* of the

⁴ Even had the trial court been silent regarding rebuttal or impeachment, we believe that evidentiary principles and the Michigan Rules of Evidence would have given the prosecutor a basis to at least raise rebuttal and impeachment arguments if defendant took the stand and testified on issues that were worthy of rebuttal and impeachment.

⁵ Furthermore, assuming that an analysis under MRE 404(b) is necessary, we find that evidence of the immigration matter would have served a proper purpose other than to prove his character or propensity to commit a crime, that the evidence was relevant, and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The other acts evidence, which showed that defendant abused his federal authority and position to accomplish his own personal motives or ends, reflected a "system in doing an act," MRE 404(b)(1), that was also employed in the case at bar.

offenses independent of MRE 404(b). Res gestae evidence is an exception to MRE 404(b). *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). Evidence of a defendant's other acts that are so blended or connected to the crime for which defendant is charged is generally admissible to explain the circumstances of the charged crime so that the jury can hear the "complete story." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Thus, MRE 404(b) does not preclude the admission of evidence intended to give the jury an intelligible presentation of the full context in which disputed events occurred. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

In this case, defendant's use of his government-issued SUV and firearm was clearly part of the res gestae of the charged offenses. The evidence indicated that defendant used his federal position in an authoritative manner, both verbally and nonverbally, to facilitate the commission of the charged offenses. The evidence showed that he exposed his government vehicle, firearm, badge, and windbreaker when approaching and questioning the complainants in public. Although defendant chooses to ignore the affect of his use of these items related to his position as a federal agent in carrying out his actions, the evidence was part of the "complete story" surrounding the offenses and helped explain the complainants' fears of defendant and the responses of the complainants and witnesses throughout the criminal episode. Thus, the evidence was admissible as part of the res gestae of the charged offenses, independent of MRE 404(b).

III. THE PROSECUTOR'S ARGUMENTS

Defendant's last argument is that the prosecutor improperly made remarks during closing and rebuttal arguments that evoked sympathy for the victim and that asserted facts not supported by the evidence. We disagree. Although the trial court at one point interrupted the prosecutor and warned him not to ask the jurors to place themselves in the victim's shoes, defendant did not object to any of the prosecutor's remarks or request any other curative action. Accordingly, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

As the prosecutor played a portion of the surveillance video during closing argument, he remarked, "Put yourself in [Kristopher's] shoes did any of this look fun?" Defendant correctly argues that a prosecutor may not appeal to the emotions and sympathies of the jurors. *Watson*, 245 Mich App at 591. But isolated remarks and appeals that are not blatant will not rise to the level of prosecutorial misconduct. *Id.* In this case, the challenged remark was isolated and, considered in context, did not involve an improper appeal to the jury's sympathy. The prosecutor was not asking the jury to convict defendant based on emotions or sympathy, see *People v Cooper*, 236 Mich App 643, 653; 601 NW2d 409 (1999), but rather was urging them to evaluate the circumstances as they would have been perceived by Kristopher to determine whether Kristopher was in fear at the time defendant was questioning him. This was a proper argument related to the evidence at trial, and it was also responsive to defendant's claim that Kristopher laughed during the encounter and that defendant only pulled his firearm because he was in fear for his own life.

Moreover, any perceived prejudice arising from the prosecutor's remark could have been cured by a timely instruction. *Watson*, 245 Mich App at 586. Indeed, the trial court's intervention and warning to the prosecutor outside the presence of the jury alleviated the potential for any unfair prejudice by stopping the prosecutor from making any additional, comparable remarks. Defendant did not request any further action by the trial court. Nonetheless, in its final instructions, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that it was not to let sympathy or prejudice influence its decision, and that it was to follow the court's instructions. These instructions were sufficient to cure any perceived prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). 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 contends that during rebuttal argument, the prosecutor argued facts not supported by the evidence when he remarked that defendant's mother "cussed out" the police because of defendant's position as a federal agent. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). But prosecutors are afforded great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, and they need not state their inferences in the blandest possible language. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

At trial, an investigating Detroit police officer testified that he twice called defendant's mother's house regarding the break-in at her house and that the person he spoke to used "cuss words" and then hung up on him. The prosecutor's remarks were supported by this testimony and reasonable inferences arising from it. *Bahoda*, 448 Mich at 282. Further, once again, a timely objection to the challenged argument could have cured any perceived prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. And even though defendant did not object, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. These instructions were sufficient to cure any possible prejudice. *Long*, 246 Mich App at 588.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray