STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 20, 2013
v	No. 308825 Newaygo Circuit Court
WESLEY WALTER BOWER, II, Defendant-Appellant.	LC No. 10-009801-FC

Before: SERVITTO, P.J., and WHITBECK and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant also appeals the trial court's judgment of sentence ordering him to pay a crime victim's assessment fee of $130. We affirm because the only error below, the admission of hearsay statements made by the victim, was harmless, and defendant's trial counsel was not ineffective.

On October 17, 2010, defendant shot and killed the victim, who was his ex-wife. At the time of the shooting, defendant and the victim were alone in a bedroom in defendant's house. Defendant and the victim had two children together, B. and C., both of whom were inside defendant's house at the time of the shooting, as was the victim's mother, Cathy Wirt. At trial, the defense conceded that defendant shot and killed the victim, but argued that he was guilty of voluntary manslaughter or at most second degree murder rather than first degree murder.

Defendant argues that the trial court violated his due process right to a fair and impartial jury by allowing the jurors to ask questions of witnesses during the trial. Because defendant did not object when the trial court permitted the jurors to submit questions for witnesses, this issue is not preserved. See *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under the plain error rule, defendant must show that an obvious error occurred and "that the error affected the outcome of the lower court proceedings." *Id*. at 763.

MCR 2.513(I) permits jurors to ask questions of trial witnesses:

> The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

In *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972), our Supreme Court permitted trial courts, in their discretion, to allow jurors to ask questions of trial witnesses. According to the Court,

> [t]he practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court. It would appear that in certain circumstances, a juror might have a question which could help unravel otherwise confusing testimony. In such a situation, it would aid the fact-finding process if a juror were permitted to ask such a question. We hold that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. [*Id*.]

In this case, defendant does not argue that the trial court failed to employ an appropriate procedure for the juror questions or that any juror question was improper under Michigan court rules or case law. Rather, defendant argues that, "as a matter of law reform," the practice of permitting jurors to ask questions of trial witnesses should stop. In support of this proposition, defendant relies on the Minnesota Supreme Court's decision in *State v Costello*, 646 NW2d 204, 215 (Minn, 2002). However, we are not bound by the decisions of courts of other states, such as *Costello*. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011). Rather, we are bound by the Michigan Supreme Court's decision in *Heard*. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007). Given that Michigan law permits jurors to ask questions of trial witnesses and that defendant does not claim, and the record does not support, that any of the juror questions in this case were improper under Michigan law, defendant has not established plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764. Accordingly, we reject defendant's claim that the trial court violated his right to due process by permitting the jurors to ask questions of the trial witnesses.

Defendant next argues that trial court erred by admitting the victim's hearsay statements under MRE 804(b)(6). We agree that the trial court erred in admitting the challenged testimony, but find that the error does not entitle defendant to relief. We review defendant's preserved claim of evidentiary error for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "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, 387; 749 NW2d 753 (2008). "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

"Generally, hearsay is inadmissible unless it comes within an exception to the hearsay rule." *People v Dendel*, 289 Mich App 445, 452; 797 NW2d 645 (2010) (citation omitted).

> MRE 804(b)(6) provides an exception to the hearsay rule for a statement by a declarant made unavailable by the opponent. If the declarant is unavailable as a witness, the rule allows admission of "[a] statement 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." MRE 804(b)(6). [*People v Jones*, 270 Mich App 208, 212; 714 NW2d 362 (2006).]

Defendant challenges the testimony of three witnesses—Sharon Couts, Ashley Herman, and Wirt—regarding statements that the victim made to each of them. The trial court ruled that the challenged testimony was hearsay that was admissible under MRE 804(b)(6). The trial court did not find, and the record before us does not support, that defendant killed the victim with the intention of preventing her from testifying. Rather, the trial court ruled that "the prosecutor does not have to show that the defendant caused the declarant to be unavailable with the intent to prevent her from testifying, just merely that his wrongdoing caused her to be unavailable to testify here." In so ruling, the trial court abused its discretion. MRE 804(b)(6) applies only where the defendant's wrongdoing was intended to procure the unavailability of the declarant as a witness. *Jones*, 270 Mich App at 212. See also *Giles v California*, 554 US 353, 359-360, 367; 128 S Ct 2678; 171 L Ed 2d 488 (2008) (explaining that FRE 804(b)(6) codifies the forfeiture by wrongdoing doctrine, which applies only if the defendant's actions were undertaken for the purpose of preventing the declarant from testifying).

We nonetheless find that defendant is not entitled to relief because it does not "affirmatively appear that it is more probable than not" that the erroneous admission of the challenged hearsay statements "was outcome determinative." *Lukity*, 460 Mich at 495-496. The challenged hearsay statements indicated that defendant tried to arrange for the victim to meet him alone on October 6, 2010, and again on October 17, 2010. Although this evidence potentially supported that defendant planned to get the victim alone so that he could kill her, the prosecution presented ample other evidence that defendant shot the victim with premeditation.

Defendant's uncle testified that sometime during the months preceding the shooting, defendant stated that he was going to shoot and kill the victim. B. testified that defendant had previously stated that he was going to kill the victim someday. C. testified that on the day of the shooting, defendant convinced the victim to come inside his house and thereafter led the victim inside his bedroom and locked the door. Wirt, B., and C. all testified that they were sitting a short distance from defendant's bedroom at the time of the shooting, and they never heard any arguing or commotion inside the bedroom before the shooting. After shooting the victim, defendant stated that he killed her because she was going to try to take B. and C. away from him. The record also supported that defendant attempted to reconcile with his estranged father one week before the shooting; that hours before the shooting, he told his sister that he loved her, which she testified was unusual; and that shortly before the shooting, he gave B. a birthday present even though B.'s birthday was not for two more weeks. Thus, in light of "the untainted evidence," it does not appear more probable than not that the erroneous admission of the challenged hearsay statements was outcome determinative. *Lukity*, 460 Mich at 495-496.

Defendant next argues that the trial court erred by admitting evidence that he spanked B. excessively, which constituted inadmissible prior bad acts evidence under MRE 404(b). Defendant did not object below, and our review of defendant's unpreserved claim is limited to plain errors affecting his substantial rights. *Carines*, 460 Mich at 763-764.

MRE 404(b)(1) provides:

> 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.

In addition to the grounds set forth under MRE 404(b)(1), evidence of other bad acts is admissible when it is offered as part of the res gestae of the charged offense, for the purpose of presenting a comprehensive overview of the circumstances of the case for the jury's consideration. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). In *Sholl*, 453 Mich at 742, quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), the Court stated:

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [Citations omitted.]

In the present case, the prosecution introduced evidence that defendant spanked B. excessively on December 12, 2009. C. testified that this was "the last straw," and the victim and the children moved out of defendant's house that same day. The prosecution never sought to admit the challenged evidence under MRE 404(b). Rather, it appears from the record before us that the spanking incident was presented as res gestae evidence, for the purpose of explaining why the victim and the children suddenly moved out of defendant's house and to provide context for defendant's subsequent missing persons report, the personal protection order (PPO) that the victim subsequently obtained against defendant, and the victim's subsequent motion to change custody. The record supported that defendant and the victim were involved in a custody dispute from the time she left defendant in December of 2009 until the time of the shooting. Detective Sergeant Rios testified that defendant referenced his ongoing custody dispute with the victim as an explanation for why he shot her; and Wirt and C. each testified that defendant stated that he shot the victim because he believed that she would take the children from him.

Thus, it appears that the victim's murder was connected to her decision to move out of defendant's house with the children in December 2009 and move to change custody, which in turn, was predicated on defendant's spanking of B. on December 12, 2009. Under these circumstances, the jury was "entitled to hear the complete story," which included defendant's

spanking of B. *Sholl*, 453 Mich at 742 (quotation omitted). Thus, defendant has not shown that the trial court plainly erred by admitting the evidence regarding the spanking incident.

Even assuming that the challenged evidence was inadmissible as improper MRE 404(b), defendant has not shown "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. The only disputed issue at trial was whether defendant killed the victim with premeditation. Defendant fails to explain how evidence that he spanked B. excessively on December 12, 2009, would lead the jury to conclude that he shot and killed the victim with premeditation—rather than on an impulse—on October 17, 2010. Furthermore, the trial court minimized the risk of prejudice by instructing the jury that it "must not convict the defendant here solely because you think he is guilty of other bad conduct." See *People v Crawford*, 458 Mich 376, 399 n 16; 582 NW2d 785 (1998) ("[A] limiting instruction will often suffice to enable the jury to compartmentalize evidence and consider it only for its proper purpose . . . ."); *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011) ("Jurors are presumed to follow the instructions of the court."). As discussed above, the prosecution presented substantial evidence supporting the conclusion that defendant killed the victim with premeditation. There was no plain error requiring reversal. *Carines*, 460 Mich at 763-764.

Defendant also raises a related argument that his trial counsel was ineffective for failing to object to the evidence that defendant spanked B. excessively on December 12, 2009. "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

For the reasons discussed above, we find that the challenged evidence was admissible and, thus, defendant has not shown that trial "counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms." *Yost*, 278 Mich App at 387. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel."). Moreover, the challenged other acts evidence was consistent with the defense's theory that defendant had a volatile and aggressive relationship with the victim that culminated in his impulsive shooting of her. Trial counsel possesses "wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and a defendant must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Thus, even if the challenged other acts evidence was inadmissible, defendant has not overcome the presumption that defense counsel's decision not to object to such evidence "constituted sound trial strategy under the circumstances." *Toma*, 462 Mich at 302. Furthermore, in light of the unchallenged evidence supporting the finding that defendant acted with premeditation, defendant has not shown that "that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Yost*, 278 Mich App at 387.

Defendant next argues that his trial counsel was ineffective for failing to move to disqualify the prosecutor. We granted defendant's motion to remand for a *Ginther*[1] hearing to address this particular claim of ineffective assistance of counsel. *People v Bower, II*, unpublished order of the Court of Appeals, entered September 19, 2012 (Docket No. 308825). At the *Ginther* hearing, defendant's trial counsel acknowledged that he was aware that the prosecutor had previously represented defendant in a 2002 PPO matter involving the victim and a 2003 domestic violence case, in which defendant was charged with assaulting the victim. However, trial counsel testified that after discussing the matter with defendant, he chose not to move to disqualify the prosecutor, who had only recently been appointed to office and had never prosecuted a murder case. The record supported that the prosecutor did not utilize at trial any personal knowledge regarding his previous representation of defendant. The trial court concluded that trial counsel was not ineffective for opting not to seek disqualification of the prosecutor. Given the circumstances of the instant case, and that fact that trial counsel possesses "wide discretion in matters of trial strategy," *Odom*, 276 Mich App at 415, defendant has not "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances," *Toma*, 462 Mich at 302.

Finally, defendant argues that the trial court violated the federal and state ex post facto clauses by ordering him to pay $130 under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*. We review defendant's unpreserved ex post facto challenge for plain error affecting his substantial rights. *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012).

> The ex post facto clauses of both the state and federal constitutions prohibit inflicting a greater punishment for a crime than that provided for when the crime was committed. A statute violates ex post facto principles if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence. [*Id*. (citations and quotation omitted).]

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

At the time defendant committed the instant offenses, MCL 780.905(1)(a) required the trial court to assess a $60 fee to convicted felons. 2005 PA 315. Subsequently, on December 16, 2010, the Legislature amended MCL 780.905(1)(a) to require a $130 fee. 2010 PA 281; see also *Earl*, 297 Mich App at 111-112. In *Earl*, 297 Mich App at 111-114, we held that a trial court does not violate the federal or state ex post facto clauses when it imposes a $130 assessment under the amended CVRA for a crime committed before the amendment's effective date. An assessment under the CVRA "is neither restitution nor punishment," and it does "not affect matters of substance." *Id.* at 113-114. Accordingly, the trial court in the instant case did not violate the ex post facto clauses or plainly err by imposing a $130 assessment. *Id*.

Affirmed.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro