STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2007
v	No. 266509 Kalamazoo Circuit Court
CASEY HAYES PERRY, Defendant-Appellant.	LC No. 04-001408-FC

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, and the trial court sentenced defendant to life imprisonment. Defendant appeals as of right. We affirm.

Defendant was romantically involved with the victim on and off from approximately 1991 to 2000 and fathered five of her children. The couple was not in contact during defendant's incarceration between May 2000 and December 2003. Defendant initiated contact with the victim shortly after his release from prison. Defendant told investigators that he visited the victim in Kalamazoo several times during March 2004 and that they were deciding at that time whether to reconcile. He drove her from Kalamazoo to his home in Michigan City, Indiana, on March 26, 2004, and then returned her to Kalamazoo, where she was residing with her brother, Kirk Dement, and her boyfriend, Rex Garr. Defendant told investigators that he ended his relationship with the victim just after midnight on March 27, 2004, when he dropped her off at her residence. However, Dement and Garr testified that the victim was last seen alive on March 27, 2004, that she was with defendant at that time, and that she never returned to their residence. On May 2, 2004, the victim's naked body was found partially submerged at the edge of Asylum Lake in Kalamazoo. She died from multiple stab wounds to the abdomen, the base of the neck, and the forehead. Her body had been covered with wooden pallets and her arms, legs, and head were submerged in two feet of silt at the bottom of the lake.

The prosecutor's theory of the case was that evidence of defendant's abusive, obsessive, and controlling behavior throughout the course of his relationship with the victim established that he was responsible for her death. The trial court permitted the prosecutor to admit evidence of defendant's prior bad acts against the victim under MRE 404(b) to prove a pattern of violence, motive, intent, and identity. The prosecutor presented extensive testimony describing a history of relationship discord and domestic violence between 1991 and 2000.

I

Defendant argues that the trial court erred by admitting evidence of his violent and obsessive behavior toward the victim during the course of their romantic relationship before his incarceration. We disagree.

As a general rule, the use of other acts as evidence of defendant's character is prohibited because there is a danger that a defendant will be convicted based on a history of misconduct rather than on facts sufficient to prove that he committed the offense charged beyond a reasonable doubt. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). However, MRE 404(b) permits other acts evidence in certain circumstances. The prosecutor has the initial burden of showing that the other acts evidence is relevant to a noncharacter theory, such as those found in the nonexclusive list under MRE 404(b). *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). This Court will not reverse a trial court's decision to admit other acts evidence absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). No reversal is required for a preserved error in the admission of other acts evidence unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227. The burden to demonstrate that the error affected the outcome of the trial is on the defendant. *People v Thomas,* 260 Mich App 450, 457; 678 NW2d 631 (2004).

A four-part test must be satisfied in order for other acts evidence to be admissible under MRE 404(b). *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). First, the prosecutor must expressly offer the evidence for some purpose other than showing the defendant's propensity to commit the offense. *Id*. at 74. Second, the evidence must be relevant to an issue or fact of consequence at trial. *Id*. Third, the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *Id*. at 75. Fourth, the trial court, upon request, may provide a limiting instruction. *Id*. Further, MRE 404(b)(2) requires a prosecutor to provide reasonable notice in advance of trial "of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence."

Initially, we note that defendant's appellate brief does not assert that any specific piece of the voluminous evidence admitted under MRE 404(b) should have been excluded; rather, he generically argues that all of the testimony regarding violent acts or stalking that allegedly occurred between 1991 and 2000 was irrelevant under *VanderVliet, supra* at 74-75. The issue, therefore, is whether evidence of a history of relationship discord was relevant to prove a non-character theory at issue.

A review of the record reveals that all four parts of the test for admission of evidence under MRE 404(b) were satisfied and that the trial court did not abuse its discretion by admitting the other acts evidence. First, the prosecutor gave advance notice of his intent to admit evidence of defendant's prior bad acts against the victim for a proper purpose; that is, to prove, motive, intent, identity, and a pattern of violence by defendant against the victim.

Second, the evidence of defendant's pattern of domestic violence was highly relevant and probative of defendant's motive as well as his identity as the killer. Proof of motive in a prosecution for murder is always relevant and evidence of other acts to prove motive is admissible under MRE 404(b). *People v Rice (On Remand),* 235 Mich App 429, 440; 597

NW2d 843 (1999). Furthermore, a general denial of participation in the killing places a defendant's motive for killing the victim in issue. *People v Armentero*, 148 Mich App 120, 133; 384 NW2d 98 (1986). Evidence of a history of relationship discord between a defendant and a murder victim is relevant to prove premeditation and motive to kill the victim. *People v Charles Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). See also *People v Jerry Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992); *People v Hoffman*, 225 Mich App 103, 110; 570 NW2d 146 (1997). And, motive is highly relevant where, as here, the proofs are primarily circumstantial. *Charles Fisher, supra* at 453. Whether discord is of a type that would provide a motive for murder constitutes an issue of weight rather than admissibility. *Id.*

The evidence established that defendant stalked the victim each time she fled their relationship and that he used violence against her when she resisted his demands that she return to live with him. In 1994, he tracked her to Detroit and set on fire the house in which she was staying. In 1998, he tracked her to her brother's home in the Upper Peninsula and sent her letters threatening to kill her and her family. In 1999, he showed up at her brother's home in the middle of the night with a bag containing items that suggested that he planned to bind and injure the victim. In 2000, the victim had to be rescued from what she alleged was involuntary confinement in defendant's home. On the day of her disappearance, defendant was attempting to reestablish a relationship with the victim, who was then involved with another man. Defendant told investigators that he drove the victim to his home in Indiana earlier on the day she disappeared to show her his home there. All of this evidence was highly relevant and probative of whether defendant had a motive to kill the victim if, as the prosecutor argued, she rejected his attempts at reconciliation.

Defendant contends that the evidence of past domestic violence and stalking was irrelevant to any material fact because all of the reported incidents took place between 1991 and 2000. However, the remoteness in time of other acts affects its weight rather than its admissibility. *People v McGee*, 268 Mich App 600; 709 NW2d 595 (2005). Furthermore, the record reveals that defendant was incarcerated between the spring of 2000 and December 2003. The pattern of domestic violence was brought to a halt by this period of incarceration. Defendant took steps to locate the victim shortly after he was released from prison, and even tried to obtain contact information during his incarceration.

Third, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. *VanderVliet, supra* at 75. Prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury. *Rice, supra* at 441. The trial court properly found in this case, however, that the domestic violence that was part of defendant's relationship with the victim before the hiatus in their relationship was substantially probative and outweighed the danger of unfair prejudice. The pattern of violence, stalking, and reconciliation under threats of violence could have carried over into the couple's renewed relationship in 2004. The challenged other acts evidence was highly probative of defendant's motive, identity, and pattern of domestic violence, and was not excluded by MRE 403.

Finally, the trial court instructed the jury that the evidence of defendant's past acts could not be considered for a propensity purpose. Therefore, any improper prejudice that may have been caused by the admission of the other acts evidence was cured by this instruction as jurors are presumed to follow their instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d

342 (2004). Accordingly, we find that the trial court did not abuse its discretion in admitting the evidence of defendant's history of domestic violence against the victim.

II

Defendant argues that the prosecutor exercised a peremptory challenge against an African-American juror on the basis of his race in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 69 (1986). A prosecutor's right to exercise a peremptory challenge is limited by the United States Supreme Court's ruling that peremptory challenges based on race violate the Equal Protection clause of the Fourteenth Amendment. *Batson, supra* at 87-88. *Batson* mandates a three-step process that is to be employed in both criminal and civil proceedings to determine whether a peremptory challenge is based on purposeful discrimination. *Id*. at 96-98. First, the opponent of the peremptory challenge must establish a prima facie case of racial discrimination. Second, if the first step is satisfied, the burden of production shifts to the proponent of the challenge to produce a race-neutral justification for the strike of the individual juror. Third, the trial court must articulate its decision regarding whether the opponent of the strike has proved purposeful racial discrimination. *People v Bell*, 473 Mich App 275, 278-279; 702 NW2d 128 (2003). The standard of review for claims based on *Batson* depends on which of the three *Batson* steps is at issue. *People v Knight*, 473 Mich 324, 339; 701 NW2d 715 (2005). "[T]he first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review." *Id*. at 342. The second step is subject to de novo review. *Id*. at 344. Step three, whether the opponent of the peremptory challenge has satisfied the ultimate burden of proving purposeful discrimination, is a question of fact that is reviewed for clear error. *Id*. at 34.

Here, the trial court ruled that defendant established a prima facie case of purposeful discrimination. Consequently, this Court is called upon to review the trial court's findings for *Batson* steps two and three. *Knight, supra* at 337-338. The proponent's explanation of the use of a peremptory challenge need not be "persuasive, or even plausible" to satisfy *Batson*'s second step. *Id*. at 337, quoting *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). A reviewing court must find that the proponent has satisfied this step as a matter of law unless the proffered reason is facially discriminatory. *Knight, supra* at 343-344. Here, the prosecutor's race-neutral explanation satisfied the *Batson's* second step as a matter of law. The prosecutor claimed that he dismissed the juror based on his familiarity with the crime scene. He stated his concern that jurors who had visited Asylum Lake would make light of the evidence that defendant had frequented the exact area of lakefront where the body was located.

With respect to step three of the *Batson* test, the proffered race-neutral explanation is persuasive in light of all relevant circumstances. *Id*. at 344-345. Reviewing courts must accord great deference to the trial court's factual finding on discriminatory intent because it is largely based on evaluation of issues that lie peculiarly within a trial judge's province. *Id*. Defendant asserts that the trial court erred in accepting the prosecutor's race-neutral explanation because his treatment of Caucasian prospective jurors who were familiar with Asylum Lake demonstrates that the purported reason for the strike of the African-American juror was pretextual. Defendant notes that the prosecutor passed on the challenged juror, juror 183201, several times during the first day of jury selection when he had the opportunity to question the panel regarding their familiarity with Asylum Lake. He also asserts that the prosecutor failed to exercise a peremptory strike against a Caucasian juror who was equally familiar with Asylum Lake. Contrary to

defendant's assertion, however, the record reveals that, before excusing juror 183201, the prosecutor exercised peremptory challenges against the only two Caucasian jurors who acknowledged that they had actually visited Asylum Lake. A third Caucasian woman revealed that her daughter lived near the park but she was excused by the defense before the panel was asked whether they had actually entered the park. The record does not support defendant's assertion that this juror was familiar with the interior of the park as were the jurors purportedly dismissed for that reason by the prosecutor. A review of the record does not demonstrate that the prosecutor selectively applied his race-neutral justification for striking prospective jurors. *Id*. The trial court did not err in determining that the prosecutor dismissed the jurors for credible and race-neutral reasons. *Knight, supra* at 344.

III

Defendant contends that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. Defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra* at 687. To demonstrate prejudice, defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Because defendant failed to move the trial court for a new trial or *Ginther*[1] hearing, review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant claims that defense counsel was ineffective for failing to call certain witnesses to attest to defendant's good character, to testify that defendant was with them after he left the victim on March 27, 2004, and to challenge the testimony of certain prosecution witnesses. Decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This Court will not substitute its judgment for that of trial counsel regarding such matters. *People v Davis*, 250 Mich App 357; 368; 649 NW2d 94 (2002). While a defendant is entitled to have his counsel "prepare, investigate, and present all substantial defenses;" a substantial defense is "one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant has not shown that trial counsel's failure to present the witnesses deprived him of a substantial defense. Defendant's proposed witnesses were not res gestae witnesses and defendant has not shown that their testimony would have exculpated him. *People v Bass*, 247 Mich App 385, 392; 636 NW2d 781 (2001), *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant has failed to provide the alleged substance of these witnesses' testimony as it relates to contradicting the

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

testimony of the prosecution witnesses or establishing an alibi for a relevant time period. Defendant has failed to establish the factual predicate for his claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Additionally, the medical records provided by defendant on appeal do not support a conclusion that trial counsel was ineffective for failing to present the testimony of defendant's physicians. The medical reports indicate that defendant was injured at work on March 25, 2007, and that the injury was minor. Defendant was released back to work the same day with restrictions on the amount of weight he could carry. The records do not support defendant's argument that the alleged injury could have precluded defendant from committing the murder. Defendant has not established a reasonable probability that the result of the proceeding would have been different if the physicians had been called to testify.

IV

Finally, defendant argues that the prosecutor allowed prosecution witnesses to commit perjury. Prosecutors have a constitutional duty to report when a prosecution witness lies under oath and may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Contrary to defendant's assertion, the record does not establish that the prosecutor encouraged the introduction of false testimony. Defendant contends that testimony describing a duffel bag found by police in defendant's car on June 27, 1999, was false. He appears to argue that a law enforcement witness offered false testimony when he characterized the bag and its contents as a "kill kit." However, the prosecutor did not solicit the characterization offered by the witness, and the trial court twice instructed the jury to disregard the officer's characterization. Moreover, even assuming the characterization was objectionable, it was not objectively false or deceptive because the officer was offering his personal interpretation of the contents of the bag, which included a knife, duct tape, rubber gloves, KY jelly, and a rope.

Defendant fails to explain or support his remaining allegations that the prosecutor offered false testimony and, therefore, he has abandoned those arguments. A defendant may not announce a position and leave it to this Court to explain and rationalize that position. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Because there is no tangible indication that the prosecutor engaged in any misconduct or that the evidence defendant claims was false could have affected the verdict, we reject defendant's claim of error.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens