STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2007
v	No. 273444 Wayne Circuit Court
BEATRICE TAYLOR, Defendant-Appellant.	LC No. 06-006525-01

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced to 36 to 50 years' imprisonment. We affirm.

Defendant was convicted of killing Geraldine Davis, who died as a result of a stab wound to the chest in May of 2006. At trial, the prosecution presented evidence that defendant had previously stabbed two people in a similar fashion. In 1992, defendant stabbed her supervisor James Zelmanski in the chest, causing him to be hospitalized. In 1993, she repeatedly stabbed her boyfriend Sandy Brown in the chest, killing him.

I.

Defendant first argues that the trial court abused its discretion in admitting under MRE 404(b) evidence regarding her stabbings of Zelmanski and Brown. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Pursuant to MRE 404(b), evidence of an individual's other crimes, wrongs, or acts is inadmissible to show a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The evidence may, however, be admissible for other proper purposes. See MRE 404(b). In *People v VanderVliet,* 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court clarified the test to determine the admissibility of other bad-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

MRE 403 provides that even relevant evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice to the defendant. *People v Layher*, 464 Mich 756, 769; 631 NW2d 281 (2001).

Defendant argues that the trial court abused its discretion in admitting evidence of her prior bad acts because it was not admitted for a proper purpose. Evidence of bad acts, however, may be admissible for 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 . . . ." MRE 404(b). In this case, the prosecution presented evidence that defendant stabbed Zelmanski and Brown to show intent, knowledge, and lack of mistake or accident. Defendant raised these issues by claiming that she did not know that she "grabbed a knife" before she stabbed Davis and that she "wasn't trying to hurt [Davis]." The fact that defendant previously stabbed two people in the chest, killing one, makes it more likely that she intended to stab Davis and that she realized the potential consequences of her actions. "The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently . . . , and conversely, the more likely it is that the defendant's act is intentional." *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005) (citations omitted). Therefore, we find that the evidence was admitted for a proper purpose pursuant to MRE 404(b).

Defendant additionally argues that the challenged evidence was irrelevant. We disagree. The prosecutor initially bears the burden of establishing relevance. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). To be relevant, evidence must be material to a fact of consequence to the action. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). Here, the prosecutor argued that this evidence was relevant to show intent, knowledge, and absence of mistake or accident, which were issues of consequence at trial. Contrary to defendant's argument on appeal, we find that the facts surrounding the previous stabbings were sufficiently similar to the facts in this case to demonstrate intent, knowledge, and absence of mistake or accident. It is well-established that "where other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant." *McGhee*, *supra* at 611.

Further, defendant argues that the evidence of her prior acts was unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); MRE 403. Although the challenged evidence may have been damaging to defendant's position, it was highly probative because it was relevant to issues of consequence at trial and there is no evidence that the jury gave it preemptive weight.[1] Moreover, the trial

[1] The trial court exercised its discretion under MRE 403 in excluding evidence that defendant had stabbed Brown 27 times.

court provided a limiting instruction to the jury, stressing that the evidence was not to be used for propensity purposes, effectively eliminating any unfair prejudice to defendant. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Therefore, we disagree with defendant's position.

Defendant also argues that the admission of the challenged evidence was not harmless error. Because we have concluded that the trial court did not abuse its discretion in admitting the evidence, we need not address defendant's claim of harmless error.

II.

Defendant next argues that the prosecutor committed misconduct at trial. We disagree. Generally, a claim of prosecutorial misconduct is a constitutional issue that we review de novo. *Id*. at 272. But, when a claim of prosecutorial misconduct is unpreserved, we review for plain error affecting the defendant's substantial rights. *Ackerman*, *supra* at 448. Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id.* at 448-449, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where a curative instruction could have alleviated any prejudicial effect reversal is not warranted. *Id*. at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant claims that the prosecutor committed misconduct by informing the jury during her opening statement that defendant served jail time for Brown's murder and that defendant was on parole when she killed Davis. Because defendant objected to the prosecutor's statement at trial, we review this issue de novo. *Abraham*, *supra* at 272. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Watson*, *supra* at 586. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Before trial, the court ruled that evidence regarding defendant's stabbings of Zelmanski and Brown was admissible at trial. The court did not, however, specifically address whether defendant's sentence for Brown's murder was admissible. When evaluating the prosecutor's isolated statement about defendant's sentence in light of all of the evidence presented at trial, we cannot conclude that the statement denied defendant a fair and impartial trial. The testimony at trial revealed that defendant admitted to killing Brown. Considering this admission, the jury could have reasonably inferred that defendant served a sentence for Brown's murder. Furthermore, the trial court cured any potential for error by instructing the jury that the attorneys' statements and arguments were not evidence. *Ackerman*, *supra* at 449; *Watson*, *supra* at 586. Therefore, defendant cannot establish that the outcome of the case would have been different but for the prosecutor's reference to defendants' prior sentence.

Defendant further claims that the prosecutor committed misconduct by stating during closing arguments that defendant "has a prior record for violence," and that "the smallest thing seems to make this woman angry and when she gets angry she will kill you, that's her response. She will kill you." Because defendant failed to object to the prosecutor's statement at trial, we review for plain error affecting her substantial rights. *Ackerman*, *supra* at 448. In general, a prosecutor is granted great latitude in her closing argument. *People v Bahoda*, 448 Mich 261,

282; 531 NW2d 659 (1995). She "is free to argue the evidence and all reasonable inferences from the evidence as it relates to [her] theory of the case." *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Defendant claimed that she stabbed Zelmanski, Brown, and Davis by accident or out of self-defense. But, the evidence presented at trial established that defendant stabbed Zelmanski after he disciplined her sister at their workplace and that she stabbed Brown upon finding him engaged in sexual intercourse with another woman. At trial, the prosecutor argued that defendant killed Davis out of aggression and not by accident or out of self-defense. We find that the prosecutor's statements about defendant's history of violence and of stabbing people out of anger related to the prosecution's theory of the case and were supported by properly admitted evidence. Therefore, defendant has failed to establish plain error affecting her substantial rights.

III.

Finally, defendant argues that her trial counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's statements during closing arguments. We disagree. Because the trial court was not presented with and did not rule on defendant's claim of ineffective assistance of counsel, we are left to our own review of the record in evaluating her assertions. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied her a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Considering that the prosecutor's statements during closing arguments did not constitute misconduct, as discussed *infra*, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Furthermore, an objection would have led to a curative instruction. In this case, the trial court actually gave an instruction to the jury that effectively eliminated any prejudice resulting from the prosecutor's statements. Thus, defendant cannot establish that an objection by defense counsel would have changed the outcome of the case. *Id*.; *Ackerman*, *supra* at 449; *Watson*, *supra* at 572. Defendant has failed to overcome the presumption of effective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering