

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 16, 2013

v

RASHEEDA DANIELLE TINSLEY,  
  
Defendant-Appellant.

No. 308551  
Macomb Circuit Court  
LC No. 2011-001259-FH

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Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit great bodily harm less than murder, MCL 750.84.<sup>1</sup> She appeals by right, and we affirm.

Defendant’s assault conviction arises from the alleged theft of a pink purse. Defendant went to a nightclub with a group of friends, but left to attend an after-party at a home. When she left the club, defendant placed her purse behind the passenger seat of her vehicle. The purse was defendant’s “everything,” and it stored her personal items, including credit cards and cash. Defendant was parked outside of the after-party when she asked the vehicle’s rear occupants to pass her purse forward. Shambria Riley, defendant’s then lifelong friend, was in the backseat with the victim, Riley’s cousin. Both women indicated that the purse was not in the backseat, and it was not found following a vehicle search. The rear occupants went into the after-party while defendant and her friend continued to search for the purse. Ultimately, defendant accused the victim of stealing the purse. The victim denied the theft, but refused to allow defendant to search her vehicle.

Defendant left the party, and the victim went outside when she learned that something might be happening to her vehicle. Once outside, the victim observed defendant attempting to

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<sup>1</sup> After the jury rendered its verdict, defendant pleaded guilty to the misdemeanor charge of possession of marihuana, MCL 333.7403(2)(d). She was sentenced to one-year in jail and two years’ probation for the assault conviction and two years’ probation for the possession conviction. Defendant was granted bond pending appeal. The issues raised on appeal relate only to the assault conviction. She does not challenge her sentences on appeal.

break the windows of the victim's vehicle with a crowbar. The victim testified that defendant was partially seated in her own vehicle when the victim punched defendant in the face and pulled her out of the vehicle. According to the victim, the women fought in the street. The victim was led away by a man when suddenly she was cut in the back and the face by defendant.

On the contrary, defendant testified that she was merely seated in her vehicle when she was punched in the face by the victim. As the victim pulled defendant from the vehicle, defendant grabbed a box cutter. Defendant was on the ground with the victim on top of her and used the box cutter to get the victim off of her. Despite defendant's claim of self-defense, she was convicted of assault with intent to commit great bodily harm less than murder.

Defendant first alleges that she was denied a fair trial and due process of law when the prosecutor failed to exercise due diligence and produce an endorsed witness. We disagree. The trial court's ruling regarding due diligence and the propriety of a "missing witness" instruction is reviewed for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). "A trial court may be said to have abused its discretion only when its decision falls outside the range of principled outcomes." *People v Nicholson*, 297 Mich App 191, 196; \_\_\_ NW2d \_\_\_ (2012). Counsel's statements of "unequivocal indications" that he approved of a course of action taken in the trial court constitutes waiver. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). "To hold otherwise would allow counsel to harbor error at trial and then use that error as an appellate parachute[.]" *Id.* (internal punctuation and footnote omitted.) The failure to object deprives the "court of the opportunity to correct the error at the time it occurs." *People v Vaughn*, 491 Mich 642, 673-674; 821 NW2d 288 (2012).

A res gestae witness is an individual who witnesses some event in the continuum of the criminal transaction such that the testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). The prosecutor must include the names of all known res gestae witnesses on the witness list attached to the information and all known witnesses who might testify at trial. *Id.*; MCL 767.40a(1). Not less than 30 days before the trial, the prosecutor shall provide a list of all witnesses he intends to produce at trial, but may add or delete the witnesses upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(3), (4). The prosecutor also has an obligation to provide law enforcement assistance to investigate and produce witnesses sought by the defense. MCL 767.40a(5); *Long*, 246 Mich App at 585-586.

The underlying purpose of MCL 767.40a is to provide notice to the accused of potential witnesses. *People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003). The plain language of MCL 767.40a reveals that the Legislature did not intend for the statute to act as a bar to relevant evidence. *Callon*, 256 Mich App at 327. Rather, the statute provides the trial courts with the discretion to permit the prosecution to amend its witness list at any time to add or delete witnesses. *Id.* Furthermore, the statute was not designed to allow defense counsel to engage in "gamesmanship." *Id.* at 328. Consequently, even if MCL 767.40a is violated, a defendant must show prejudice from the violation. *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1992). Specifically, the defendant must demonstrate unfair prejudice that would warrant a new trial for a purported violation of MCL 767.40a. *Callon*, 256 Mich App at 328-329. Simply put, noncompliance does not mandate dismissal or reversal when defendant fails to establish prejudice. *People v Williams*, 188 Mich App 54, 58-60; 469 NW2d 4 (1991).

At the start of trial and before the jury was impaneled, the prosecutor reported an incident of witness intimidation. The prosecutor had communicated with witness Dionne Shawver throughout the proceedings, but he was suddenly unable to contact this witness. Two days earlier, she had assured the prosecutor of her presence at trial. The parties apparently agreed, at the suggestion of defense counsel, that trial proceed, and the issue would be addressed in the future if necessary. Before closing arguments and jury instructions, defense counsel requested a missing witness instruction. The prosecutor offered to delay the trial to send deputies to search for the witness. Curiously, defense counsel did not agree to delay the trial to obtain the testimony of the missing witness. The trial court stated that, in light of the discussions held in chambers, defense counsel was supposed to subpoena this witness if he required her presence. Defense counsel did not refute the trial court's summation of this agreement reached in chambers. Accordingly, this issue has been waived. *Kowalski*, 489 Mich at 504-505. Furthermore, even assuming that there was a violation of MCL 767.40a, defendant failed to demonstrate unfair prejudice. *Callon*, 256 Mich App at 328-329.<sup>2</sup>

Next, defendant contends that the trial court erred by excluding evidence of a relationship between the victim and Shawver and by excluding evidence of the victim's violent character. We disagree. This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *Id.* "A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

When the trial court's ruling excludes evidence, it is incumbent on the party seeking admission to make an offer of proof, and error may not be predicated on the exclusion of evidence unless a substantial right of the party is affected. MRE 103(a)(2); *People v Witherspoon*, 257 Mich App 329, 331; 670 NW2d 434 (2003). When a defendant fails to present evidentiary support, the theory is speculative, and the appellate court cannot conclude that plain error affecting substantial rights occurred. *Id.* at 331-332; *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999).

In the present case, defendant failed to make an offer of proof addressing her excluded testimony regarding any relationship between the victim and Shawver. Therefore, we cannot conclude that plain error affecting substantial rights occurred. *Witherspoon*, 257 Mich App at 331-332; *Hampton*, 237 Mich App at 154. Furthermore, we note that evidence regarding a relationship between the two was raised and denied. The victim and her cousin, Riley, were

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<sup>2</sup> Although defense counsel asserted that he preserved a record of Shawver's testimony, the submission presented was actually a police report. Police reports are generally inadmissible hearsay. *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 254; 805 NW2d 217 (2011). A claim of ineffective assistance of counsel was not raised in the statement of questions presented, and therefore, the issue was waived. MCR 7.212(C)(5); *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

questioned regarding an intimate relationship and testified that the two were merely friends. It is unclear how defendant would have established a foundation of personal knowledge with information to the contrary.

Moreover, we note that defendant's view of the relationship between the victim and Shawver was seemingly introduced, albeit in a derogatory manner. When defendant raised the accusation of purse theft with Riley purportedly committed by the victim and Shawver, she used a slur to describe their sexual orientation. Although defendant testified that she did not use offensive language, but only use the term "gay," nonetheless, defendant's theory of their relationship was effectively presented to the jury. Accordingly, we cannot conclude that an abuse of discretion occurred. *Yost*, 278 Mich App at 353.

With regard to the evidentiary claim regarding the victim's violent character, defendant failed to submit the police reports in the lower court record delineating the victim's violent character. A separate record regarding defendant's knowledge of specific instances of the victim's violent character was not preserved in the record. Therefore, we cannot conclude that plain error affecting substantial rights occurred. *Witherspoon*, 257 Mich App at 331-332; *Hampton*, 237 Mich App at 154. Moreover, the summation of the report provided by defense counsel on the record indicated that the victim was not charged with a crime, but rather was the complainant in a criminal matter. Assuming this summation was correct, the trial court did not abuse its discretion in holding that the evidence was inadmissible where the victim in this case was also the victim of another crime. *Yost*, 278 Mich App at 353.

Lastly, defendant contends that the trial court erred by failing to provide the rebuttable presumption instruction found in MCL 780.951 to the jury. We disagree. A claim of instructional error involving a question of law is reviewed de novo, but the trial court's conclusion that a jury instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). The jury instructions must include all elements of the charged offenses in addition to any material issues, defenses, and theories if supported by the evidence. *McGhee*, 268 Mich App at 606. Imperfect instructions are not erroneous if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007) (citation omitted). The defendant bears the burden of proving that a claim of instructional error resulted in a miscarriage of justice. *Dupree*, 486 Mich at 702. MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

When a defendant announces a position without rationalizing the basis of the claim, the issue has been abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Here, defendant concludes that she occupied a vehicle when assaulted by the victim, and therefore, the rebuttable presumption provision found in MCL 780.951(1)(a) applied. However,

the statute further provides that when the occupied vehicle is utilized to further the commission of a crime, the presumption does not apply, MCL 780.951(2)(c). In the present case, it was alleged that defendant utilized her vehicle to block in the victim's vehicle and utilized a crowbar to attempt to break the windows of the victim's car. Moreover, the trial court instructed that the prosecutor had a higher standard of proof, proof beyond a reasonable doubt, with regard to the raised claim of self-defense. Accordingly, defendant failed to meet her burden of proof. *Dupree*, 486 Mich at 702.

Affirmed.

/s/ Donald S. Owens  
/s/ William C. Whitbeck  
/s/ Karen M. Fort Hood