

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY A. FERQUERON,

Defendant-Appellant.

UNPUBLISHED

November 17, 1998

No. 197481

Oakland Circuit Court

LC No. 94-130590 FC

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), two counts of felonious assault, MCL 750.82; MSA 28.277, one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). Defendant subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to concurrent prison terms of twenty to forty years for each of the first-degree CSC convictions, forty to sixty months for each of the felonious assault and felon in possession of a firearm convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's instant convictions arose from his December 2-3, 1993 assault of his then-wife, from whom defendant was subsequently divorced. The victim supplied extensive testimony at trial regarding the events of December 2-3 and the long history of other violent abuses defendant inflicted on her, while defendant did not testify. Defendant's son, who was present in the home but asleep when the assault began, also testified at trial. He denied seeing defendant commit the charged offenses, and also denied telling a police officer that he had observed defendant point either a rifle or a compound bow and arrow at the victim. Testimony at trial established that, shortly after the December 1993 incident, the victim recanted the allegations that defendant had assaulted her, but eventually recanted her recantation. Thus, the principal issue in the case was the victim's credibility.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant initially raises many arguments contending that the trial court erred in various ways by admitting evidence of his prior abusive acts toward the victim, which he argues led to his inevitable conviction. The prosecutor initially filed a pretrial motion to admit other acts evidence pursuant to MRE 404(b), alleging that the evidence was relevant to explaining the victim's post-incident behavior (i.e., her recantation of the assault allegations), and to prove defendant's intent to injure. Although the trial court denied the motion because it determined that the prejudicial value of the evidence substantially outweighed its probative value, the court's order was without prejudice. The trial court later granted the prosecutor's motion for rehearing, concluding that, except for three incidents of violence involving defendant's children, the other acts evidence was admissible to illustrate defendant's system of control over the victim, and was necessary to explain why the victim recanted her allegations.

The rule governing the admissibility of prior acts or crimes provides as follows:

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. [MRE 404(b)(1).]

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), the Supreme Court articulated a four-part test for determining the admissibility of other 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. [*VanderVliet*, *supra* at 55.]

The decision whether to admit evidence of other acts under MRE 404(b)(1) is within the trial court's discretion, and will only be reversed when the court has clearly abused that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant first claims that the prosecutor's rehearing motion violated MCR 2.119(F)(1), made applicable to defendant's criminal proceeding through MCR 6.001(D), because it was not filed within fourteen days after entry of the trial court's original order finding the other acts evidence inadmissible. However, because the issue whether the prosecutor timely brought her second motion pursuant to MCR 2.119(F)(1) was not raised in the trial court, it has not been preserved for appeal. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994); *Gavulic v Boyer*, 195 Mich App 20, 24 n 2; 489 NW2d 124 (1992). Defendant further argues that the prosecutor in moving for rehearing failed to demonstrate that the trial court palpably erred in its original ruling, as required by MCR 2.119(F)(3). However, the "palpable error" requirement of MCR 2.119(F)(3) merely provides guidance to the trial court in deciding reconsideration motions and does not operate to restrict the trial court's discretion in

determining whether a grant of reconsideration is appropriate in a particular case. *Michigan Bank-Midwest v DJ Reynaert, Inc*, 165 Mich App 630, 645-646; 419 NW2d 439 (1988). Because, as will be discussed, we agree that the trial court erred in its original ruling, we conclude that the trial court did not abuse its discretion either in hearing or granting plaintiff's renewed motion.

Defendant next suggests that other acts evidence is inadmissible to explain the conduct of a nonparty, and that the trial court therefore could not have properly admitted other acts evidence to show the victim's motive for recanting her initial allegations. By its own terms, MRE 404(b) is applicable to any "person," and thus is not limited to evidence concerning only a defendant. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). Furthermore, we do not perceive a conflict between MCL 768.27; MSA 28.1050, which addresses the admissibility of similar acts of a defendant when "the defendant's motive, intent . . . mistake or accident . . . is material," and MRE 404(b). Both provisions permit the utilization of prior acts to prove something other than action in conformity therewith. The statute by its terms merely addresses prior acts of a defendant used to prove a defendant's state of mind, but in no way proclaims to otherwise forbid evidence of the acts of someone other than a defendant, or to forbid the admissibility of prior acts to prove the state of mind of someone other than a defendant. See *Starr, supra* at 501-503 (testimony by victim's half-sister of defendant's similar prior acts of sexual abuse against her admissible under MRE 404(b) to rebut defendant's claim that instant charges were fabricated). Defendant offers no other support for his argument, and we conclude that this argument is without merit.

Defendant next contends that the other acts evidence was not relevant to a fact in issue because the victim's post-incident behavior could not be an issue until defendant first raised it. Thus, defendant claims that the prosecutor, during her case-in-chief, improperly introduced rebuttal evidence by offering both the evidence of the victim's recantations as well as the other acts evidence to explain the recantations. In support, defendant cites *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947):

Rebuttal evidence is broadly defined, as that given by one party to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. In practical application the line of demarcation between rebuttal evidence and that which should properly be given in chief before the prosecution rests is frequently more or less obscure, and it is a general rule that whether evidence which could have been offered before resting may be given in rebuttal is a matter within the discretion of the trial court.

Because the victim's allegations represented the primary evidence against defendant, her credibility was certainly material to the instant case. Additionally, the evidence regarding defendant's other crimes and acts against the victim tended to establish that defendant coerced the victim into attempting to weaken the prosecutor's case. Therefore, the other acts evidence was relevant to the victim's credibility, a fact in issue. *Starr, supra* at 496-498. Considering that the defense intended to attack the victim's credibility during cross-examination, we conclude that the trial court did not abuse its discretion by allowing the prosecutor to offer during her case-in-chief the other acts evidence relevant to the victim's credibility. *DeLano, supra*.

Next, defendant alleges that even if the other acts evidence was relevant, the trial court erred in admitting all of the acts in question without considering whether the evidence was more prejudicial than probative. The specific evidence to which defendant objects on this basis includes evidence of the following acts: that he sexually assaulted the victim's daughter by forcing her into a bedroom and then grabbing her breasts and vagina; evidence that he physically abused his first wife; a photo of the victim after the victim's first husband assaulted her; the victim's testimony that defendant defecated on her during an assault on June 2, 1993; and the victim's testimony that defendant threatened to end his own life, that he shoved two individuals at the retirement party of one of the victim's coworkers, that he attacked his sons, Phillip and Justin, with a hockey stick, and that he told Phillip that he wasn't defendant's son.

Much of this evidence that defendant now challenges was introduced in the form of a defense exhibit, which was admitted over the prosecutor's objection. The exhibit, referred to as the "blue book," is a notebook of material accumulated by the victim to assist defendant, and which includes police incident reports for many of defendant's prior violent acts. Defense counsel apparently introduced the notebook to illustrate the extent to which the victim had coordinated defendant's defense, which would in turn show that defendant did not exercise complete control over the victim. Given the fact that defendant brought this information out to support his case, it is not a proper ground for reversing his convictions. *People v Bart (On Remand)*, 220 Mich App 1, 15; 558 NW2d 449 (1996) (counsel may not harbor error to be used as an appellate parachute in the event of jury failure).

Moreover, the trial court did not err in allowing the victim's testimony that defendant defecated on her as part of one assault incident, or by allowing the victim to testify that defendant had threatened to commit suicide. The victim's testimony regarding these events was again relevant to her credibility. This testimony enabled the jury to better understand the dynamics of the relationship between defendant and the victim, illustrating defendant's system of controlling the victim, and tending to show that defendant may have succeeded in pressuring the victim to recant her initial allegations. *People v Daoust*, 228 Mich App 1, 13; 577 NW2d 179 (1998). While this testimony undoubtedly prejudiced defendant to some degree, we conclude that the testimony did not unfairly prejudice defendant, nor did any resulting prejudice substantially outweigh the testimony's probative value regarding defendant's system of control over the victim and the victim's credibility. MRE 403.

We do agree with defendant that the other acts evidence relating to the 1986 beating suffered by the victim at the hands of her first husband was irrelevant to the victim's credibility in the instant case and to defendant's system of controlling her through abuse. Even if this other acts evidence could be considered relevant, its marginal probative value was substantially outweighed by the possibility that it would merely elicit sympathy for the victim within the jury. MRE 403. Thus, the trial court erred to the extent that it admitted evidence regarding this 1986 assault by the victim's first husband.

Defendant further argues that the trial court erred in admitting evidence of many other acts that occurred as far back as 1987, including testimony of defendant's assault of the victim during their honeymoon and his violent attacks later that year. Defendant did not object at trial on this

basis, and thus did not preserve the issue for appeal. *Stanaway, supra*. Furthermore, MRE 404(b) does not prescribe any time limitation. The remoteness of the event constitutes one factor that the trial court may consider in exercising its discretion to determine whether the evidence should be allowed under MRE 404(b), and properly affects its weight rather than its admissibility. In the instant case, given that the 1987 assaults fit into defendant's pattern of controlling the victim, illustrating that defendant had exercised control over the victim from the very beginning of their relationship, the prior acts admitted by the trial court are probative of the victim's credibility. Therefore, we conclude that the trial court did not abuse its discretion in admitting this evidence.

Next, defendant contends that the trial court erred by refusing his offer to stipulate to some of the other acts evidence, without making a calibrated decision like that the Supreme Court required in *Old Chief v United States*, 519 US 172; 117 S Ct 644, 651-652; 136 L Ed 2d 574 (1997). Although defendant suggests that the trial court allowed the prosecution to pile up other acts evidence after rejecting his offer to stipulate, defendant has failed to develop his argument by citing a single specific instance in which the trial court admitted other acts evidence after rejecting the offer to stipulate. Thus, we conclude that defendant, by his failure to argue in his brief on appeal the merits of this allegation of error, has abandoned this issue. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Defendant additionally claims that the trial court's jury instructions improperly allowed the jury to consider the other acts evidence for the purpose of determining his motive, which went beyond the purposes for which the trial court originally admitted the evidence, namely to show his system of controlling the victim and to explain the victim's reason for recanting her initial assault allegations. Because defendant failed to object at trial to the instruction regarding motive, appellate review is waived absent manifest injustice. *People v Welch*, 226 Mich App 461, 463; 574 NW2d 682 (1997). Furthermore, we have determined that the other acts evidence was properly admitted and properly considered by the jury for the purposes mentioned above. We conclude that the mere fact that the trial court indicated that the jury could consider the evidence for the purpose of showing defendant's motive, in light of the fact that the evidence was properly admissible for other purposes, that trial court's instructions tracked CJI 2d 4.11 and were otherwise in accord with the applicable law, and that the trial court instructed the jury not to consider the other acts evidence for the purpose of determining defendant's culpability regarding the instant charges, did not create manifest injustice.

Defendant finally argues regarding the other acts evidence that any error in the admission of this evidence cannot be considered harmless when the evidence prejudiced him in what was essentially a credibility contest between the victim's various, contradictory statements. When reviewing the effect of a trial court's evidentiary errors, these errors are deemed harmless if it is highly probable that the evidence did not contribute to the verdict in light of the strength and weight of the untainted evidence. *People v Gearns*, 457 Mich 170, 173; 577 NW2d 422 (1998).

We have determined that the only erroneously admitted evidence constituted photographs of injuries suffered by the victim after a beating administered by her first husband. We can discern no impact that these photographs could have had on the jury's evaluation of the victim's credibility. Furthermore, especially in light of the strength and weight of the prosecutor's other properly admitted

evidence, including independent physical evidence consistent with the alleged abuse, we conclude that it is highly probable that the erroneously admitted photographs did not contribute to the jury's verdicts. *Id.* at 204-205.

Next, defendant contends that the trial court erred in permitting the prosecutor to impeach defendant's son, Justin, with his prior inconsistent statements to the police. The decision whether evidence is admissible is within the trial court's discretion, and should only be reversed where there is a clear abuse of discretion. *Starr, supra* at 494.

Defendant's reliance on *Stanaway, supra*, is misplaced. In *Stanaway*, the Supreme Court held that a prosecutor cannot under the guise of impeachment employ a prior inconsistent statement of a witness that directly tends to inculcate the defendant if the witness does not give any further testimony for which his credibility is relevant. *Id.* at 692-693. The *Stanaway* Court held that impeachment was improper when a witness who had no personal knowledge of the criminal offenses was called as a witness solely for the purpose of giving testimony about an incriminating statement that the defendant had made to him. *Id.*

In *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997), the Supreme Court clarified its *Stanaway* holding:

The rule set forth in *People v Stanaway* is that the impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case.

This is a very narrow rule and does not apply in the instant case. Although the substance of the statements used to impeach the credibility of the witness were indeed relevant to a central issue of the case, the second prong of the test was not met because there was other relevant testimony from the witness for which his credibility was relevant.

In the instant case, while the substance of the statements used to impeach Justin's credibility were relevant to proving defendant's guilt, the central issue of the case, there was other testimony for which his credibility was relevant. Justin, a witness to the alleged offenses, testified at trial that defendant and the victim had an argument, but denied that defendant had pointed a rifle or a bow and arrow at the victim. This testimony directly conflicted with that of the complainant. Therefore, as in *Kilbourn, supra* at 684, the police officers' testimony regarding Justin's prior inconsistent statements was admissible to impeach Justin's credibility. Moreover, the trial court gave a cautionary instruction regarding the proper use of the prior inconsistent statements. We conclude that the trial court did not abuse its discretion in admitting the prior inconsistent statements.

Defendant further suggests that the prosecutor improperly utilized Justin's testimony "as a springboard to introduce" other acts evidence regarding defendant's violent acts toward his children. The other acts evidence regarding defendant's violence toward his children had previously been

admitted by the trial court. The prosecutor obtained information regarding these acts from the “blue book” offered into evidence by defendant. As we indicated above regarding defendant’s challenge to the trial court’s admission of this evidence, given the fact that defendant sought the introduction of this information, he may not now argue that the prosecutor’s utilization of the information was improper. *Bart, supra*.

Defendant also claims that the prosecutor infringed on his constitutional right to counsel by both filing a motion to disqualify defendant’s former defense counsel, Richard Rosenberg, and by calling Rosenberg as a witness at trial. According to the victim, Rosenberg, although retained to act as defendant’s defense counsel, held himself out as her attorney as well as defendant’s. The victim claimed that even though she had informed Rosenberg that her allegations against defendant were true, Rosenberg urged her to recant her allegations, and for defendant’s sake to take responsibility for having filed a false police report alleging abuse. The victim also claimed that Rosenberg pressured her to release to him her medical records. In light of this information regarding the potential conflict of interest arising from Rosenberg’s representation of defendant and his alleged contacts with and coercion of the victim, the prosecutor properly moved to disqualify Rosenberg. See MRPC 1.7, comment (“Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question.”). Furthermore, the trial court denied the prosecutor’s motion. Thus, we conclude that the prosecutor’s motion did not in any way infringe on defendant’s right to counsel.

Regarding the prosecutor calling Rosenberg as a witness, the prosecutor called Rosenberg after he had withdrawn as defense counsel. The prosecutor engaged in no misconduct because Rosenberg had personal knowledge of relevant matters. Furthermore, defendant never objected on the bases of relevance or prejudice to the prosecutor’s questioning of Rosenberg. Nor did Rosenberg’s presence as a trial witness prejudice defendant, as he argues; in fact, much of Rosenberg’s testimony seems to support defendant’s position that the victim’s credibility was in doubt.

Next, defendant argues that the prosecutor engaged in misconduct by accusing defendant and his counsel of obstructing justice. The record reveals that defendant did not object to the prosecutor’s closing argument on the basis that she improperly implied that defense counsel had engaged in obstruction of justice. Absent an objection at trial, appellate review of alleged improprieties in a prosecutor’s closing argument is precluded, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687.

The prosecutor’s references in the instant case to obstruction by the defense did not result in manifest injustice. Defendant correctly cites *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), for the proposition that it is improper for the prosecutor to question defense counsel’s veracity. However, our review of the record indicates that this case is distinguishable from *Dalessandro* because the prosecutor never impugned the character or veracity of defendant’s trial counsel. The prosecutor’s several references to obstruction during her closing argument referred to efforts by defendant and his one-time attorney Rosenberg, who had withdrawn from the case over one year prior to the beginning of trial, to prevent the victim from testifying against defendant. Trial testimony by the victim alleged these acts by defendant

and Rosenberg, and the prosecutor was free to address this evidence in her closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Because the prosecutor's arguments were not improper, defendant suffered no manifest injustice, and we decline to further review this issue.

Lastly, defendant contends that the cumulative effect of trial court errors denied him a fair trial. However, because we have found no palpable error on any one issue, we are incapable of finding a cumulative effect of several errors. *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988).

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Robert J. Danhof