

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

February 18, 2021

Plaintiff-Appellee,

v

No. 351052

Washtenaw Circuit Court

LC No. 18-000880-FC

GREGORY AGNEW,

Defendant-Appellant.

Before: M. J. KELLY, P.J., and RONAYNE KRAUSE and REDFORD, JJ.

PER CURIAM.

Defendant, Gregory Agnew, appeals as of right his conviction of first-degree premeditated murder, MCL 750.316(a)(1). Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

In August 1993, Tammy Niver went missing under suspicious circumstances. Before her disappearance, she had been in a strained relationship with Agnew. At one point, one of Niver’s friends overheard Agnew pondering what it would be like to strangle someone. She recounted him wondering “if their eyes would bulge,” “if they would thrash around,” and if “they would change colors.” Another witness overheard Niver tell Agnew she was going to leave him. Agnew responded by roughly grabbing her arm and saying “if you ever leave me I’ll kill you.” The witness later asked Agnew what he meant by that comment, and Agnew responded that he “could get rid of a body without ever getting caught.” A few months later, on August 6, 1993, Niver took her children and went to a friend’s house. Yet, because she did not have her medicine, she returned to Agnew’s home. She was never seen again.

On August 7, 1993, a police officer saw Agnew run across a busy intersection. Because it was approximately 3:30 a.m., the officer followed and confronted him. He noted that Agnew’s pants were wet from the knees down, but did not detain him. Later, Agnew told the police that he had gone out to rent a movie from a video rental store. The police found his story suspicious because the video store had closed at 2:00 a.m. Later, the vehicle Niver had been driving was discovered approximately one mile from where Agnew had been stopped. On further questioning, Agnew told the officer that Niver had gone to his apartment, they had engaged in sexual

intercourse, and she had left. The police obtained a search warrant for Agnew's apartment. Inside smelled of bleach and there were full garbage bags and a shovel along the hallway inside the apartment. The smell of bleach was especially strong in the bathroom, despite the rest of the apartment being messy. Further, after Niver's disappearance, Agnew told a friend that he "made that bitch disappear," and he detailed strategies for killing people and covering it up.

Eventually one of Niver's friends, Martha McGeorge, contacted the police and asked if she could help prove that Agnew was responsible for Niver's suspected death. Martha wore a wire while she attempted to elicit incriminating statements from Agnew. However, after a short while, Martha started a relationship with Agnew, so she stopped helping with the investigation. She continued her relationship with Agnew, going so far as to buy a house where they both lived. Their relationship was not without troubles. For example, in 2013, Martha called 9-1-1 during a domestic dispute. Agnew could be heard in the background, yelling about having loaded guns in the house.

In November 2014, a police detective obtained an investigative subpoena for Martha so that he could clarify her knowledge related to Niver's disappearance. While the detective spoke with Martha in the yard, Agnew exited the house and saw them speaking. He turned and ran inside, locking the door. The detective ordered the door to be broken down. Agnew was arrested and the detective requested the prosecution review potential charges against him. Yet, Martha did not divulge any additional information, and the prosecution refused to charge Agnew. Martha, not wanting to be questioned by the police again, decided to marry Agnew so she would be protected by spousal privilege. The two married at the end of 2014.

Martha was murdered sometime between the evening of February 16, 2018 and the morning of February 17, 2018. At the time, she was in the process of divorcing Agnew and was living separately from him. Martha's children stated that Agnew was mentally and verbally abusive to their mother, and that upon leaving him, she became healthier and happier. The only asset of value at issue in the divorce was the marital home. When she initially separated from Agnew, Martha went to live with her daughter. Within a week, a fire started in the attic of the marital home. Martha suspected Agnew caused the fire, but the fire department found that it was an accident. The fire caused a dispute between Agnew and Martha about who would receive benefits from the insurance company. Eventually, it was decided that the insurance would pay for a rental house that the two would share. Agnew had the rental home from 10:00 a.m. to 7:00 p.m. each day, while Martha would stay there overnight.

Approximately a month before Martha's death, a police detective became aware of the divorce and its contentious nature. He went to speak with Martha on January 18, 2018, asking if she had any information about the Niver's disappearance. Martha denied having any new information, and when the detective left, she sent a text message to Agnew letting him know that the police asked about Niver. Agnew questioned Martha about what she said and suggested that she say nothing and just walk away in the future. He encouraged Martha to not let the police into the house and expressed his hope that she had not told them about the divorce. She informed Agnew that the police already knew about the divorce and the fire at the marital home.

When Martha failed to pick up her grandson on February 17, 2018, her daughter drove to her residence and noted that Martha's vehicle was still in the driveway, but was unable to enter the house because the doors and windows were all locked. The daughter called Agnew, who was the only person besides Martha with a key to the house. Agnew eventually met her at the house and opened the door. Martha's daughter found Martha's body on the bed with a towel wrapped around her head. She screamed and Agnew looked into the bedroom and saw Martha. He helped Martha's daughter out of the house and left while she was calling 9-1-1. Agnew turned off his cell phone for days and refused to respond to any messages.¹

The police initially suspected that Martha died of a drug overdose because she had a history of alcohol and cocaine use and because there was drug paraphernalia scattered throughout the house, including a syringe on the dresser. Martha also had blood near her mouth and nose, which is common in overdoses. Yet, a closer inspection of the scene revealed inconsistencies with that theory. The needles in the house were significantly larger than those typically used by intravenous drug users. There was an exercise band near Martha's arm, which apparently had been used as a tourniquet for the purportedly fatal injection, but the band was too thick to work properly. And the bloody discharge near Martha's mouth and nose was less foamy than would be expected from a drug overdose. There was also blood on the towel wrapped around Martha's head, but there was no obvious blood in the bathroom or in the hallway leading to the bedroom. Further, although it was common for drug users to fall and injure themselves, it was not typical for someone to clean up all the blood and arrange themselves in bed before succumbing to the overdose.

Additional investigation indicated that the wound on Martha's head looked like it would have bled a significant amount, but there was no sign of any bloody towels or rags that could have cleaned up all of the blood and none of Martha's clothing was blood covered. Using special equipment, the police discovered blood had been cleaned up in the unfurnished spare bedroom, the hallway between the bathroom and the spare bedroom, and inside the bathroom. There was a shoeprint in blood in the hallway and spatter stains in the spare bedroom and bathroom consistent with significant bleeding in those areas. There was very little blood in Martha's bedroom.

An autopsy revealed that Martha had sustained wounds consistent with a struggle before death, including blunt force injuries to her arms and shoulders and a 4.5-centimeter laceration on her head. And, although Martha had recent puncture marks in the crooks of both her arms, there were no signs of long-term intravenous drug use. Martha had potentially lethal levels of fentanyl and heroin in her blood, but the medical examiner was confident that the cause of death was strangulation based on the presence of deep hemorrhaging in the muscles on both sides of Martha's neck, and an abrasion on her chin that was consistent with someone being choked trying to use their chin to interfere with the force being used.

¹ Agnew's sister testified that she told him to lay low because the police had been after him since Niver's disappearance. However, Agnew did not remember much from that time period, including how he had obtained a new cellular phone and what happened to the phone he had had on the night Martha died.

The evidence from the scene was sent for DNA testing, and the expert concluded that the blood in the various rooms belonged to Martha. The syringe containing fentanyl that was found near Martha's body contained DNA from Agnew and Martha. Agnew's DNA was also found at various other places through the rental house, including under Martha's fingernails. Agnew's DNA expert opined that since Agnew lived in the home and shared items with Martha, it was not surprising that his DNA would be present.

Eventually, Agnew had his lawyer contact a police detective to tell him that he was okay and that he would not be making a statement to the police about Martha's death. The next day the detective learned that Agnew had been staying with friends. When he arrived, however, Agnew was not there. The friends permitted the detective to search the house for anything that Agnew may have left behind. They discovered the blue jumpsuit he was wearing when he let Martha's daughter into the house. Forensic testing showed that the jumpsuit had blood stains. The DNA analysis of the stains on the jumpsuit revealed that Martha was a contributor, along with Agnew. Agnew's friends told the detective that Agnew told them he thought Martha died of blunt force trauma. Later, another witness recounted that Agnew had also told her that Martha died of blunt force trauma. The police, however, had purposefully withheld information about the head wound from everyone, including Martha's daughters.²

At trial, one of Agnew's friends testified that Agnew told him an easy way to kill someone was to inject them with hydrochloride. Two witnesses recalled Agnew saying that someone could cover up the scent of a dead body by using coffee grounds. There were coffee grounds at Martha's house when she was murdered.

Agnew testified that he had nothing to do with Niver's disappearance, was not a violent person, and had never hit a woman. He testified that he was not concerned about money or about Martha taking everything from him in the divorce. He also stated that he was not worried that Martha would testify against him if they got a divorce. He denied being violent with Martha, and said that he had nothing to do with Martha's death.

II. ADMISSION OF OTHER-ACTS EVIDENCE

A. STANDARD OF REVIEW

Agnew argues that the trial court abused its discretion by admitting evidence of Niver's disappearance under MCL 768.27b. We review for an abuse of discretion the trial court's decision to admit evidence. *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

² Agnew's sister testified that she had learned of the blunt force trauma from Martha's daughter and had conveyed that information to Agnew. Agnew also asserted that he had learned the information from his sister. Yet, the detective was adamant that he told no one that detail of the crime.

B. ANALYSIS

The trial court admitted evidence of Niver's disappearance under MCL 768.27b, which provides in relevant part:

(1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

* * *

(4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section unless the court determines that 1 or more of the following apply:

* * *

(d) Admitting the evidence is in the interest of justice.

“The language of MCL 768.27b clearly indicates that trial courts have discretion to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403.” *People v Cameron*, 291 Mich App 599, 609; 806 NW2d 371 (2011) (quotation marks and citation omitted). Niver’s disappearance in 1993 is more than 10 years before Martha’s February 2018 murder. Thus, in order to be admissible under MCL 768.27b, the trial court had to—and did—determine that its admission was “in the interest of justice.” See MCL 768.27b(4)(d).

The statute does not define the phrase “interest of justice.” However, in *People v Rosa*, 322 Mich App 726, 734; 913 NW2d 392 (2018), this Court held that such evidence should only be admitted under MCL 768.27b(4)(d) if the evidence is “uniquely probative” or is “needed to ensure that the jury was not misled without the admission of the evidence.” *Id.* In this case, Agnew was charged with the murder of his wife, Martha, in February 2018, whereas Niver went missing in August 1993. Despite the temporal gap, the murder and disappearance are uniquely linked. Martha was friends with Niver before she went missing and watched Niver’s children for a period of time after her disappearance. Martha approached the police and offered to assist them with making a case against Agnew. She wore a wire and, for a time, attempted to record inculpatory statements from Agnew. That was ultimately unsuccessful when Martha decided to begin a relationship with Agnew and told police that she would no longer wear a wire. Thus, Agnew and Martha’s relationship began under the cloud of Niver’s disappearance and there was a possibility that Martha had important evidence about the issue.

As their relationship progressed, Agnew and Martha became concerned about the interest the police showed in obtaining testimony from Martha about Niver’s disappearance. After the police spoke with Martha in 2014, she married Agnew so she could avoid being questioned by the police in the future. The issue regarding Martha’s potential knowledge about Niver’s disappearance arose again in January 2018, when police became aware of the pending divorce and

spoke with Martha, who immediately told Agnew about the contact. Agnew demanded to know why, and he urged Martha to say nothing to police and to not let them in the house. Martha told him that she told police the divorce had nothing to do with Niver's disappearance; Agnew reacted by stating “[y]eah, right.” Less than one month after that exchange of text messages, Martha was killed. Based on the foregoing, it is clear that Agnew’s involvement in Niver’s disappearance was not simply “consistent with and cumulative to” the charged conduct. See *Rosa*, 322 Mich App at 734. Instead, the evidence related to Niver’s disappearance was “uniquely probative” of the facts at issue in the present trial. *Id.*

Moreover, the facts related to Niver’s disappearance were important for the jury to understand because of the reasonable inference that Agnew killed Martha to stop her from testifying against him as related to that disappearance. Therefore, in addition to being uniquely probative to this case, if the evidence of Niver’s disappearance had been left out of the trial, there was a significant risk that the jury would have been misled about Agnew’s potential motive for murdering Martha. On this record, the trial court did not abuse its discretion when it determined that admitting the evidence was in the interest of justice under MCL 768.27b(4)(d).

Nor did the trial court abuse its discretion by declining to exclude the evidence under MRE 403. Under MRE 403 relevant and otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” “Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence.” *People v Gipson*, 287 Mich App 261, 263; 787 NW2d 126 (2010) (quotation marks and citation omitted). Such concerns arise where the tendency of the proposed evidence is “to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *Cameron*, 291 Mich App at 611 (quotation marks and citation omitted).

Agnew complains that the evidence should have been excluded under MRE 403 because it would lead the jury to believe that he had the propensity to commit such crimes. Yet, evidence admissible under MCL 768.27b can be used “in order to show a defendant’s character or propensity to commit the same act.” *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010). Our Supreme Court has held that, when considering evidence that is admissible to prove propensity and weighing probative value against the danger of unfair prejudice under MRE 403, “courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *People v Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012). Thus, Agnew’s contention that the evidence regarding Niver’s disappearance improperly reflected too heavily on his character and propensity to commit a similar attack on Martha actually supports the probative value of the evidence under the test required in MRE 403.

Agnew next asserts that the sheer volume of evidence about Niver’s disappearance confused the jurors and they may have convicted defendant of Martha’s murder because they believed he was involved in Niver’s disappearance. However, although several witnesses testified about events involving Niver, the majority of the testimony and evidence was related to Martha’s death. Indeed, the evidence regarding Niver was largely admitted during the first two days of the trial, meaning that the jury retired to deliberate after several days focused on the death of Martha. Further, Agnew fails to acknowledge that Niver’s disappearance, rather than confusing the jury,

was actually required for a full understanding of the case. Absent evidence about her, the jury would have been left in the dark about how Agnew and Martha began their relationship, what were Martha's reasons for suddenly wanting to get married after being in the relationship for 21 years, and the context of the text messages between Agnew and Martha on January 18, 2018. The jury also would have been denied relevant and probative evidence of Agnew's potential motive for killing Martha. Therefore, even if there was a mild risk of some confusion by the jury, there is nothing in the record to suggest that such potential unfair prejudice *substantially* outweighed the significant relevance of the evidence. MRE 403. Consequently, the trial court did not abuse its discretion when it admitted the evidence of Niver's disappearance.

III. HEARSAY AND RIGHT OF CONFRONTATION

A. STANDARD OF REVIEW

Agnew next argues that the trial court abused its discretion and violated his constitutional right to confrontation by admitting evidence of out-of-court statements made by Martha and Niver. The court's decision to admit the evidence is reviewed for an abuse of discretion, *Chelmicki*, 305 Mich App at 62, and “[w]hether a defendant's Sixth Amendment right of confrontation has been violated is a question of constitutional law that this Court reviews *de novo*,” *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018).

B. ANALYSIS

“The Confrontation Clause of the Sixth Amendment bars the admission of ‘testimonial’ statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness.” *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). “A statement is testimonial if the declarant should reasonably have expected that [the] statement would be used in a prosecutorial manner and an objective witness would believe that the statement would be available for use at a later trial.” *People v Clark*, 330 Mich App 392, 433; 948 NW2d 604 (2019).

Here, there is nothing to indicate that Niver should have reasonably expected her statement that her father had helped her move from the apartment she shared with Agnew would be used in a prosecutorial manner, nor is there anything to suggest that an objective witness would believe that statement would be used at a later trial. Consequently, the statement is nontestimonial and the Confrontation Clause is not implicated by Niver's statement.

The issue is more complex when it comes to Martha's statements. Yet, even if Martha's statements were testimonial, a defendant's right to confrontation can be forfeited by wrongdoing. See *People v Roscoe*, 303 Mich App 633, 640; 846 NW2d 402 (2014). As it relates to the Sixth Amendment, “the forfeiture doctrine requires that the defendant must have specifically intended that his wrongdoing would render the witness unavailable to testify.” *People v Burns*, 494 Mich 104, 113; 832 NW2d 738 (2013). Likewise, to admit evidence under MRE 804(b)(6), “the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the declarant's unavailability; and (3) the wrongdoing did procure the unavailability.” *Id.* at 115.

Here, there is a preponderance of the evidence showing that Agnew engaged in wrongdoing and that his wrongdoing procured Martha's unavailability. Agnew had a motive to murder her based on her renewed connection with the investigation into Niver's disappearance. There was no sign of a forced entry at her house; he had a key. His DNA was located under her fingernails and her DNA was on the blue jumpsuit he wore when he let Martha's daughter into the house. The scene was staged to look like a drug overdose, and his DNA was on the syringe placed near her body. Despite evidence that Martha bled from a head wound, the house was cleaned of visible blood and Martha's head wound was concealed by a towel. Based on the testimony of Niver's disappearance, the jury could reasonably infer that Agnew had experience in cleaning up and concealing a crime scene. Further, he made statements to multiple people regarding how to conceal a body and cover up a murder. Furthermore, Martha's cause of death was strangulation; Agnew previously contemplated what it would be like to strangle someone to death. Finally, after the murder, Agnew vanished for a number of days, and, during that time, he discarded his cellular phone and obtained a new one.

Additionally, the evidence is sufficient to show that the wrongdoing was intended to procure Martha's unavailability. Martha was seriously concerned about the potential danger of Agnew believing she was talking to police about Niver. Once the divorce was progressing and the police came to speak to her, that fear became actualized. Agnew acknowledged his concern that she might testify against him in a series of text messages exactly regarding that topic. Less than one month later, Martha was murdered. Such evidence is sufficient to show by a preponderance of the evidence that his wrongdoing was intended to procure her unavailability. See *Burns*, 494 Mich at 115. Thus, all of the out-of-court statements by Martha challenged by Agnew were not admitted as a result of an abuse of discretion or a violation of Agnew's constitutional right to confrontation.

As it relates to Niver's statement, because it is impossible that Agnew's wrongdoing was intended to procure Niver's unavailability at a murder trial for a victim who was murdered approximately 25 years after Niver made the challenged statement, the trial court erred by admitting the evidence under MRE 804(b)(6). Still, an evidentiary error will not warrant relief unless the defendant demonstrates that "after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." *People v Snyder (After Remand)*, 301 Mich App 99, 111-112; 835 NW2d 608 (2013), citing MCL 769.26. Reversal is required only if the error was prejudicial, i.e., if after examining the error and assessing "its effect in light of the weight and strength of the untainted evidence . . . it affirmatively appears that the error asserted undermines the reliability of the verdict." *Snyder*, 301 Mich App at 111-112 (quotation marks, citation, and alterations omitted).

Here, the error allowed the jury to hear that Niver was moving out of Agnew's apartment and leaving him. The untainted evidence showed that Niver's relationship with Agnew was troubled. He told her that he would kill her if she left him. The night of her disappearance she went to his house with the intent to get her medicine and return to her friend's house so that her friend could get to work. Also, the night of her disappearance, Agnew was within a mile of where the borrowed vehicle was eventually discovered. His pants were wet from the knees down. His apartment, despite being messy, had a heavily bleached bathroom and there was a shovel in the hallway. He told people after the fact that he had "made that bitch disappear." Thus, there was strong evidence linking him to Niver's disappearance. The jury could use that evidence both to

infer that he had a propensity for killing women when their relationships deteriorated. Moreover, as detailed throughout this opinion, there was substantial evidence that Agnew killed Martha. Thus, after examination of the entire cause, we conclude that confidence in the verdict is not undermined so as to require reversal.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Agnew argues that the prosecutor committed misconduct during the trial. Because Agnew did not object to the alleged prosecutorial misconduct and did not request any curative instructions, this issue is unpreserved. *People v Mullins*, 322 Mich App 151, 172; 911 NW2d 201 (2017). We, therefore, review this issue for plain error affecting Agnew's substantial rights. See *Roscoe*, 303 Mich App at 648.

B. ANALYSIS

Agnew first contends that the prosecutor improperly stated his personal opinion regarding Agnew's guilt. A prosecutor should not express his or her personal opinion of a defendant's guilt. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Here, during the direct examination of a witness, the witness stated that the last time she saw Martha was the Thanksgiving before she was murdered. Agnew's lawyer objected because "we don't know that [Martha was murdered]." In response, the prosecutor stated, "I do." The prosecutor's statement that he knew Martha was murdered was not a statement that he knew Agnew murdered Martha. Moreover, the cause of death was strangulation, Martha had defensive wounds on her body, and there was substantial evidence showing that someone cleaned up all the blood at the murder scene and staged it to look like an overdose. Thus, there was an evidentiary basis for the prosecutor's belief that Martha was murdered. We conclude the prosecutor's statement was not improper.

Next, Agnew argues that the prosecutor improperly indicated that a bottle of tequila found in Martha's bedroom was planted in the room by Agnew. However, the prosecutor stated that "the laboratory report from the autopsy showed no alcohol," so the bottle of tequila found in the bedroom "had been planted." Again, the prosecutor's statement is not that Agnew planted the bottle, but rather than someone planted it. And, in light of the evidence that the crime scene was staged to look like an overdose as opposed to a violent murder by strangulation, there was an evidentiary basis for the prosecutor's statement. The prosecutor's statement, therefore, was not improper.

Finally, Agnew asserts that the prosecutor improperly elicited testimony from Agnew's former girlfriend that she believed Agnew was guilty. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, "[p]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Solloway*, 316 Mich App 174, 203; 891 NW2d 255 (2016). Here, the prosecutor asked the ex-girlfriend, "How do you feel about being here today?" She answered, "I'm very hurt about the whole situation. It's ruined a lot of relationships. It's horrible that I have to actually be here to support the other kids, like their moms are not here. And I know in my heart

what happened, I know.” While it could be inferred that the ex-girlfriend was commenting on Agnew’s guilt, the prosecutor was not seeking to elicit that testimony and was only asking whether the witness wanted to be testifying. Therefore, because the prosecutor merely made a “good-faith effort[] to admit evidence,” there is no ground for finding prosecutorial misconduct. Further, even if there was error, reversal is not warranted because a curative instruction could have alleviated any prejudicial effect. See *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010).

Affirmed.

/s/ Michael J. Kelly
/s/ Amy Ronayne Krause
/s/ James Robert Redford