STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2003
v	No. 235904 Wayne Circuit Court
DANIEL BAYSDELL, Defendant-Appellant.	LC No. 97-502723-01

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right following his jury conviction of obstruction of justice, MCL 750.505.[1] He was sentenced, as an habitual third offender, to a prison term of 4 to 10 years. We affirm.

The complainant testified that she was at the 31st District Court in Hamtramck to be a witness in a case involving defendant. In short, she indicated that the case involved criminal charges against defendant based on him making harassing and threatening telephone calls to the complainant and her friend Barbara Baker. She testified that, while she, Baker, and her sister Michelle Torres were waiting in the hallway at the courthouse, defendant saw them from his location in a holding cell with a window on its door. The complainant testified as follows about statements and actions made by defendant after he saw her:

> He was just – he saw us, and then he started just yelling out things like, you know – he said so much that day. He said that he was – if I was to say anything – you know, I'd better keep my mouth shut. But he said other words to that effect. I'd better keep my mouth shut. And then he was going like this (demonstrating[]), like this (demonstrating), and continuing to do that.

[1] MCL 750.505 codifies as a felony the commission of "any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state." We note that, subsequent to the incident underlying this case, the Legislature enacted MCL 750.122, effective March 28, 2001, which codified many, if not all, of the acts that previously constituted common law obstruction of justice. However, MCL 750.122 has no applicability to this case, which involves a conviction of the common law crime of obstruction of justice for conduct that occurred prior to the enactment of this statutory provision.

The complainant indicated that defendant made a slashing motion across his throat and, when asked how many times he did this, she said, "Oh. I don't know. He did it a couple – I would say a couple of times." She more specifically testified that defendant said, "Keep your f---ing mouth shut or else," and then made the slashing motion across his throat. She further testified that defendant "was charging at the door, trying to get out of the door," and, when asked what exactly he was doing, she said, "I guess he was like running and trying to hit it to open it." The complainant also testified that defendant referred to the death of Torres' son in a car accident and said, "How does it feel to lose a kid? How is it going to feel when Christmas comes around and you're not going to see him?"

Baker testified that, at the courthouse, defendant said, "You f---ing b----! I can't believe you are going to do this! If you say a word" and then moved his finger across his throat in a slashing motion "like he'd slit her throat." She said that she could tell this was directed at the complainant. Baker also testified that defendant told her "when this is all over with, there's no place you can run and hide; I'll find you." She said that "the night before, we had a phone call that said if we showed up, that we're all dead." Baker further testified that, at the courthouse, she heard defendant say that he was glad Torres' son "Ricky" was dead and, "How does it feel to have your son dead?"

Torres testified that defendant said, "You talk, you f---ing b----," and put his finger across his neck in a slashing motion and that he was looking at the complainant at the time. She also testified that defendant kicked, punched, and pounded on the door to his holding cell. Torres said that defendant was singing about her son Ricky, "Hah, hah, I'm glad he's dead" and various things that she could not do with him, including having Christmas with him, and that he "would like to shake the man's hand who hit my sister's car for doing such a fine job" in killing her son.

Harold Smith testified that, on the relevant date, he was a court officer at the 31st District Court. Smith said that defendant was in the lockup on that date. When asked if anything unusual happened on that date involving defendant, Smith replied:

> Yes. What we did was, when [defendant] came up, he noticed that the witnesses were sitting across from the holding cell. And what had happened, he made some type of remark. And what I did was ask the young ladies to sit down further down the hall.

Smith also testified that he "heard the like door pounding" and that he heard defendant's voice and that defendant was very loud. Smith further testified that he saw defendant take "his finger like he had a knife, and just went across his throat," and that he also heard defendant "yelling about a little boy named Ricky; that he wouldn't be home for Christmas."

Defendant testified that the complainant, Baker, and Torres taunted him while he was in the holding cell. He indicated that they were holding up pictures of his daughter and saying, "You'll never see her."[2] He indicated that he made a remark to Torres about not having her child

[2] It was undisputed that defendant and the complainant had a child together. The complainant testified that they had a child in common who was eight-years-old at the time of her testimony at the present trial.

because they were hiding his child from him. However, defendant testified that he never told anyone not to testify.

I

Defendant first argues that the trial court erred by denying his motion for a new trial based on a juror having obtained definitions for legal terms from a dictionary computer program and sharing a document with those definitions with other jurors during deliberations. We disagree. We review a denial of a motion for a new trial for an abuse of discretion. *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002); *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

There is no prejudice to a defendant from improper use of a dictionary definition by jurors if the dictionary definition is "substantively identical" to the definition of the term given by the trial court. *Id*. at 176-177. In the present case, the juror who obtained the dictionary definitions testified at the relevant evidentiary hearing that they "basically matched" the definitions given by the trial judge and that "[w]hat I got from them [the dictionary definitions] was the same thing the Judge had told us the definitions were." He further replied affirmatively when asked if the definitions from the "dictionary computer" seemed to be the same definitions given by the trial judge. This was the only significant evidence as to the content of the dictionary definitions that was presented at the evidentiary hearing.[3] This evidence indicates that the dictionary definitions were substantively identical to the trial court's instructions on the relevant terms. Thus, defendant did not show any prejudice from the use of the dictionary definitions, and the trial court did not abuse its discretion by denying defendant's motion for a new trial with regard to this matter.

II

Defendant next argues that the trial court erred by allowing the jury to hear evidence of other bad acts by defendant on the ground that the testimony should have been excluded under either MRE 404 or MRE 403. Assuming for purposes of discussion that the introduction of some or all of this other acts evidence was improper and was properly preserved for appellate review, we conclude that there is no basis for reversing defendant's conviction under the "harmless error" test applicable to nonconstitutional error.

A nonconstitutional error, even if preserved, is not grounds for reversal unless it affirmatively appears more probable than not that it was outcome determinative. *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In addition to the testimony of the complainant, Baker, and Torres about the threatening statements made by defendant in relation to the complainant's contemplated testimony, Smith, a court officer with no apparent motive to lie, testified to seeing defendant

[3] The actual dictionary definitions themselves were not produced. Another juror testified at one point that the definition of "reasonable doubt" on the document was the same definition as that given by the trial judge. However, she later clarified that she had not read the document, but that she meant the jurors' discussion of the meaning of the definition did not change. Accordingly, we place no reliance on the testimony of this juror about the definitions being the same.

making a slashing motion across his throat during his interaction with the women. This substantially corroborates their version of events by indicating that defendant acted in a threatening manner. Further, given that the conduct occurred in the context of the courtroom in which the complainant was about to give testimony in a case involving defendant, the most readily apparent motive for defendant to threaten the complainant was to deter her from testifying against him. Accordingly, we conclude that it is more probable than not that the jury would have convicted defendant even without regard to the other acts evidence at issue and, thus, defendant is not entitled to relief based on any possible nonconstitutional error in admitting this evidence.

Defendant further argues in cursory fashion that the admission of the other acts evidence constituted constitutional error because it denied him "a fair trial, a right protected by the United States Constitution." However, defendant cites no constitutional provision or case law that would have precluded the introduction of the other acts evidence at issue. In substance, defendant's argument appears to be simply that the admission of the other acts evidence violated MRE 404 and MRE 403 and that a violation of the Michigan Rules of Evidence should be considered to have denied defendant a fair trial and, thus, constitute constitutional error. The flaw with this argument is that it would effectively destroy any distinction between constitutional and nonconstitutional error—a distinction deeply embedded in our jurisprudence. See, e.g., *Lukity*, *supra* at 495, n 3. Thus, we decline to adopt defendant's position that would effectively negate this distinction. In sum, we conclude that defendant has not established constitutional error with regard to this issue. Thus, he is not entitled to relief based on this issue.

III

Next, defendant argues that the prosecutor committed misconduct by eliciting testimony during her cross-examination of defendant that he had previously been incarcerated for other offenses. The prosecution responds that it properly elicited this evidence that defendant was in prison to impeach his testimony that the complainant had prevented him from seeing their daughter during the relevant period of time. Importantly, as the prosecution points out, "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). On direct examination, defendant testified rather vaguely about the complainant repeatedly hiding their daughter from him and not allowing him to see her. The prosecutor, in cross-examining defendant, elicited that he was incarcerated twice for eighteen months each time in an effort to indicate that his incarceration, as opposed to the complainant's conduct, was a reason for much of his lack of contact with his daughter. We conclude that this was at least arguably relevant to impeach defendant's direct examination testimony and, thus, that the prosecutor's good faith inquiry into this matter did not constitute misconduct.

IV

Finally, defendant argues that there was insufficient evidence to support his conviction of obstruction of justice, contending in effect that there was insufficient evidence to support a conclusion that he attempted to intimidate the complainant into not testifying against him. We disagree. In reviewing whether there was sufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide whether any rational factfinder

could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

The common law crime of obstruction of justice encompasses the intimidation or coercion of a witness in judicial proceedings. *People v Vallance*, 216 Mich App 415, 419; 548 NW2d 718 (1996); *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). Such coercion of a witness requires that the defendant have made an oral or physical threat, but the crime is complete with the commission of the attempted coercion regardless of whether the threat actually succeeded in dissuading the witness from testifying. *People v Milstead*, 250 Mich App 391, 406; 648 NW2d 648 (2002); *Tower*, *supra*. In order to support a conviction of obstruction of justice, a defendant's acts must be "unequivocally referable" to the commission of that crime. *Id*. at 320-321. However, "there is no 'talismanic requirement that a defendant must say, "Don't testify" or words tantamount thereto'" to have committed obstruction of justice. *Id*. at 322, quoting *People v Thomas*, 83 Cal App 3d 511, 513; 148 Cal Rptr 52 (1978).

In essence, defendant is arguing that the evidence of the conduct directed at the complainant by him at the courthouse did not unequivocally refer to intimidating her into not testifying, but rather could simply have reflected his anger at her. However, as set forth above, the complainant indicated that defendant told her, "Keep your f---ing mouth shut or else," and then made the slashing motion across his throat. On its face, this was far more than a generalized expression of anger, but rather was a threat that, if the complainant did not keep her "mouth shut," she would be harmed or killed. Importantly, this threat was made in a courthouse where the complainant was set to give testimony against defendant. Further, Baker testified that defendant told the complainant at the courthouse, "If you say a word," and then moved his finger across his throat in a slashing motion "like he'd slit her throat." Similarly, Torres testified that defendant said, "You talk, you f---ing b----," and put his finger across his neck in a slashing motion and that he was looking at the complainant at the time. Viewed in a light most favorable to the prosecution, a reasonable factfinder could conclude that these threatening statements were "unequivocally referable" to deterring the complainant from testifying against defendant, especially given the location and circumstances under which the threatening statements and gestures were made. Thus, there was sufficient evidence to support defendant's conviction of obstruction of justice.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff