

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY D. NEWBY,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 205536

Recorder's Court

LC No. 97-001694

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years in prison for the felony-firearm conviction and two to four years in prison for the felonious assault conviction, the latter sentence to run consecutive to the former. We affirm.

Defendant shot the victim in the mouth with a .32 revolver. The bullet shot out six of the victim's teeth, went through her tongue, and lodged in her neck. The shooting occurred during the early morning hours after defendant, his cousin, and the victim had been playing cards and drinking. The victim testified that before he shot her, she and defendant had smoked two rocks of crack cocaine, that defendant had provided. Defendant denied smoking the cocaine. The victim stated that defendant said, "I'm getting ready to shoot a bitch," just before retrieving the gun used in the shooting. Defendant claimed that the gun had been in his back pocket and that it accidentally discharged while he was attempting to remove it, while embracing the victim, and that they fell backwards to the floor causing him to strike his arm while his finger was poised on the trigger. There were no other witnesses to the shooting.

Defendant's sole claim on appeal is that the prosecution impermissibly elicited testimony from witnesses and made improper references in his closing argument regarding defendant's alleged provision and use of crack cocaine and drinking to infer that defendant intentionally shot the victim in conformity with his unsavory character. We disagree.

Evidence relating to uncharged bad acts can be admitted either through MRE 404(b) or through the “res gestae exception.” *People v Key*, 121 Mich App 168, 180; 328 NW2d 609 (1982); *People v Smith*, 119 Mich App 431, 436; 326 NW2d 533 (1982). Uncharged bad acts are generally inadmissible to establish the defendant’s criminal propensity and, thus, to prove guilt regarding the charged offense. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993).

In the present case, evidence relating to defendant’s alleged provision and use of crack cocaine prior to the shooting was properly admitted under either MRE 404(b) or the “res gestae exception.” The “res gestae exception” is the most appropriate procedural vehicle, however, because the testimony related to defendant’s conduct a short time before the shooting. *Key, supra* at 180-181. The reasoning behind the “res gestae exception” is discussed in *People v Stoker*, 103 Mich App 800, 807; 303 NW2d 900 (1981), quoting from *People v Scott*, 61 Mich App 91, 95; 232 NW2d 315 (1975):

“It is elementary that the acts, conduct and demeanor of a person charged with a crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as a part of the res gestae. Proof of such acts is not rendered inadmissible by the fact that they may tend to show the commission of another crime.” *People v Savage*, 225 Mich 84, 86; 195 NW 669 (1923).”

The Michigan Supreme Court, in *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), further explained:

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the ‘complete story’ ordinarily supports the admission of such evidence.

Here, defendant alleged that he accidentally shot the victim in the mouth. All of the witnesses testified that there had been no arguments or confrontations between defendant and the victim prior to the shooting. The victim testified that she did not know why defendant shot her, that she and he had smoked crack cocaine, and that she heard defendant say “I’m getting ready to shoot a bitch” before to the shooting. The testimony regarding the smoking of crack cocaine was relevant to defendant’s state of mind before to the shooting because he was charged with the specific intent crime of assault with intent to murder, see *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), and his defense was that he accidentally shot the victim. Establishing lack of accident is relevant to actus reus. *VanderVliet, supra* at 87.

The testimony was also relevant to explain the circumstances surrounding the shooting because it is necessary for the jury to have an understanding of the full context in which the criminal act took place in order for them to perform their sworn duty. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Ultimately, the jury had to assess witness credibility. Because both the victim and

defendant allegedly smoked crack cocaine and drank alcohol, they were on equal footing regarding their credibility, and defendant was not unduly prejudiced by the admission of this evidence.

Furthermore, defendant used the victim's testimony in an attempt to undermine her credibility and requested that the jury be instructed as to the defense of intoxication. Thus, he cannot now claim error regarding its admission when he used it to buttress his defense. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Therefore, the admission of testimony relating to defendant's drinking and provision and use of crack cocaine before the shooting was justified, and there was no abuse of discretion by the trial court.

Defendant also alleges that the prosecutor inappropriately commented on the alleged use of alcohol and drugs prior to the shooting in his closing and rebuttal arguments. Allegations of prosecutorial misconduct are reviewed case by case, considering contested remarks in context and evaluating them in light of defense arguments and their relationship to the evidence presented at trial, to determine whether the defendant was denied a fair trial. *People v Gearns*, 457 Mich 170, 188-189; 577 NW2d 431 (1998); *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

In the present case, the prosecutor's remarks were not improper. The prosecutor is permitted to comment on the evidence presented at trial. Because the testimony regarding drinking and drug use was properly admitted, defendant was not denied a fair trial by the prosecutor's reference to such evidence.

We affirm.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Jane E. Markey