STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 9, 1999
v	No. 202918 St. Clair Circuit Court
BRANDON MICHAEL GALLIHER, Defendant-Appellant.	LC No. 96-000070 FC

Before: Markman, P.J., and Jansen and J.B.Sullivan,* J.J.

PER CURIAM.

Defendant appeals as of right his conviction and sentence for two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, two counts of conspiracy to assault with intent to do great bodily harm less than murder, MCL 750.157a; MSA 28.354(1), and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). We affirm, but caution both the trial court and the prosecution against being overzealous in the desire to assure conviction.

Defendant was a gang member in Port Huron, and the charges in this case arose out of a drive-by shooting at the home of Louis Hinojosa, a rival gang member. Gunshots had been fired at defendant's house the night before the charged incident, and defendant claimed that he committed the retaliatory shooting to send a message to the rival gang. No one was hurt in the incident, but the house was occupied by Hinojosa's fifteen-month-old brother and an uncle who was babysitting for the evening.

Defendant and two alleged coconspirators, William Lee and Derrick Witherspoon, were charged with assault (and conspiracy to assault) with intent to commit murder, and were tried together. The primary issue at trial was defendant's intent at the time of the shooting. The jury found that defendant possessed the intent to do great bodily harm less than murder. Defendant was sentenced to 80 to 120 months for each of the assault convictions, 80 to 120 months for each of the conspiracy

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

convictions, and two years for the felony-firearm conviction, with the felony-firearm sentence to be served consecutively to and preceding the assault and conspiracy convictions.

I

Defendant's first claim of error is that the trial court improperly admitted prior acts evidence. We agree.

In an attempt to establish defendant's intent at the time of the shooting, the prosecution presented evidence that defendant stabbed a rival gang member two months before the shooting incident. The admission of other acts evidence is subject to a four-part analysis:

> 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. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).]

While the prosecution in this case presented evidence of the stabbing for a proper purpose, i.e., to show intent or motive, it failed to show that the evidence was relevant to a material issue in the case. *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998). The jury was given no information regarding the stabbing except that defendant committed it and that the victim was a member of a rival gang, albeit of a different gang than was Hinojosa, the person at whose house defendant shot.[1] If the jury, therefore, relied on this evidence in reaching its verdict, it could only have concluded that because defendant once stabbed a rival gang member (for an undisclosed reason), he must have intended to hurt someone when he committed the drive-by shooting.

Moreover, the lower court erroneously instructed the jury that it could consider the stabbing as it related to defendant's propensity to act out in a similar situation. This is precisely the purpose for which prior acts evidence may *not* be admitted, and is a clear abuse of discretion. MRE 404(b)(1). The court did not point out that the instruction was error, and it's attempt to clarify the instruction could easily have been interpreted by the jury as merely adding intent and motive to the *improper* purpose of propensity to commit a crime. Although the court gave a more accurate general instruction two days later at the end of the trial, where both a proper and an improper jury instruction are given in a criminal trial, the jury is presumed to have followed the improper instruction. *People v Pace*, 102 Mich App 522, 535; 302 NW2d 216 (1980).

Having determined that the trial court clearly abused its discretion in admitting the prior acts evidence, *Crawford, supra*, 383, we turn to a harmless error analysis to assess the effect of the error. *People v Anderson (After Remand)*, 446 Mich 392, 404; 521 NW2d 538 (1994), cert den *sub nom Michigan v Anderson*, 513 US 1183; 115 S Ct 1175; 130 L Ed 2d 1128 (1995). Defendant claims that the admission of the prior act evidence denied him his due process right to a fair trial. Assuming without deciding that the error was constitutional, "[t]he line between evidentiary error and constitutional error [being] rarely clear," *People v Mateo*, 453 Mich 203, 225; 551 NW2d 891 (1996) (Opinion by

Cavanagh, J.), we determine that it was not a structural error, *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998), and reverse only if the error was prejudicial. *Crawford, supra*, 399. "The prejudice inquiry 'focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.'" *Id.*, 400, quoting *Mateo, supra*, 215.

The intent to kill or do great bodily harm may be proven by inference from any facts in evidence. *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). In this case, there was untainted evidence that defendant was "very angry" about his own house having been shot at; that he suspected that members of the Cash Flow gang including Louis Hinojosa were responsible; that he spotted Cash Flows near Mike's Food Fair on the night of the shooting, returned home, got a rifle with a scope, and went with his friends in a caravan of four cars to find them. Prior to leaving, defendant had told Ruben Haggerty that he "wanted to get them back, kill one of them or something," that "I want to kill one of them [sic] bitches," that he "wants to shoot one of them, or shoot one of their houses," that he was "tired of them always fucking around with his house," and that he "wanted to kill one of them." In one of his statements to the police, defendant said his intent was "to shoot at Cash Flows." Defendant told another officer that he fired 10 to 12 rounds at the house, but that his father "had no knowledge that they were going to shoot anyone." There was untainted evidence that the shooting took place on an evening in November when it was dark out, that the Hinojosa house had the shades drawn but the lights were on, and that the shots were fired at the front windows as opposed to the roof or the ground, leaving ten bullet holes in the windows. There was evidence that defendant, unable to locate the Cash Flows where he had previously seen them, directed codefendant Lee to drive past the Hinojosa house, slow up in front of it and turn the headlights off. It is reasonable to infer that defendant believed Hinojosa and perhaps others were indeed in the house and would therefore be shot. Additionally, codefendant Witherspoon testified that defendant's comment immediately following the shooting was, "I got the mother fuckers."

Viewing the entire record, *Anderson, supra*, 406, we conclude that the inadmissible evidence, egregious as its erroneous admission was, was harmless beyond a reasonable doubt in light of the overwhelming weight and strength of the untainted evidence. In addition to defendant's repeated statements on the night of the shooting that he wanted to shoot or to kill one of the Cash Flows, and his later statement to the police to that effect, we note especially his returning to his home for a rifle with a scope after having spotted Cash Flows, directing codefendant Lee to drive slowly by the home with the headlights off, and firing 10 to 12 rounds directly at the first floor windows of the house rather than a portion of the house less likely to cause injury or death to persons inside. Further, while the shades were drawn, the lights were on in the home, making it far more reasonable to infer someone was in the home than that the home was unoccupied. Similarly, having not found Cash Flows where he had first seen them on the night in question, it is reasonable to infer that defendant was, as he had repeatedly stated, looking for Cash Flows when he directed codefendant Lee to drive to the Hinojosa home. Finally, from defendant's statement immediately following the shooting that "[He] got the mother fuckers," it can reasonably be inferred that he was referring to persons rather than an empty house.

While the dissent found "no evidence at trial indicating that defendant knew, or reasonably should have known, that the house was occupied," the testimony that lights were on in the house and the

inferences noted above lead to a different conclusion. The dissent also states that defendant "maintained throughout the trial that he believed the Hinojosa house was unoccupied." However, defendant did not testify nor did he present any evidence to support his theory. The dissent also makes much of the fact that, after Witherspoon testified that defendant said he "got the mother fuckers," Witherspoon then testified that *he believed* defendant meant that he got the house. We would find Witherspoon's *belief* a red herring at best. In any event, it does not diminish Witherspoon's untainted testimony as to what defendant said, testimony which, as noted *infra*, enhances the harmless nature of Lee's tainted testimony to a police officer of exactly the same statement.

II

Defendant next claims that the trial court violated his constitutional rights by admitting the out-of-court statement of a non-testifying codefendant. We again agree. A police officer testified that codefendant Lee, the driver of the car carrying defendant and Witherspoon, who unlike Witherspoon did not testify, allegedly told the police that defendant said, "I got the mother fuckers," the same statement to which Witherspoon testified. The jury was then instructed that the officer's testimony could be used against defendant. The officer's testimony involved two layers of hearsay – defendant's statement and Lee's statement to the police regarding defendant's statement. Examining each level of hearsay for admissibility, MRE 805, we conclude that neither was admissible, and that the trial court clearly abused its discretion in admitting the evidence. We also disapprove of the prosecution presenting the evidence after having stipulated that it would not do so. MRE 804(b)(6).

For a nontestifying codefendant's statement to be admissible against a defendant, it must be admissible under the Michigan Rules of Evidence and it must not violate the defendant's constitutional right to confront his accuser. *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). Defendant's statement to the occupants of the car, the first level of hearsay in Lee's statement as testified to by the officer, may have been admissible under MRE 801(d)(2)(A), which allows introduction into evidence of a party's own statement when offered against that party. However, such admission in this case would be offered by one standing to gain by shifting primary gain to defendant, and, because Lee did not testify, would violate defendant's right to confront his accusers. US Const, Am VI; Const 1963, art 1, sec 20; *Spinks, supra*. Nor is defendant's statement, as suggested by the prosecution, admissible as a statement by a coconspirator under MRE 801(d)(2)(E) because , while defendant may have been a coconspirator as to either of his codefendants, the statement was offered against defendant and he was not a coconspirator as to himself.

The other layer of hearsay involved Lee's statement to the police. Because that statement similarly was an unsworn, out-of-court statement offered for its truth, it was therefore inadmissible hearsay unless it qualifies for one of the exclusions or exceptions. MRE 802. The prosecution advanced three theories: a party admission under MRE 801(d)(2)(A); a statement of a coconspirator under MRE 801(d)(2)(E); and a statement against penal interest under MRE 804(b)(3). As to the first theory, MRE 801(d)(2)(A) allows evidence of a party's own statement when offered against that party. Because Lee was a party to the criminal action, his statements to the police could only have been allowed under MRE 801(d)(2)(A) if they had been offered *against Lee himself*, not against defendant. Indeed, those portions of Lee's statement to the police describing Lee's role in the shooting were

admissible against Lee. However, the portions of Lee's statements to the police inculpating defendant were not admissible against defendant under MRE 801(d)(2)(A).

The second theory, under MRE 801(d)(2)(E), allows statements by a coconspirator if the statement is offered against a party, the conspiracy between the declarant and the defendant is established independently, and the statement was "during the course and in furtherance of the conspiracy." *Id*. The last requirement was not met in the present case. Lee's statements to the police were not made during the course of or in furtherance of the conspiracy. Rather, they were made during the subsequent investigation of the shooting. Therefore, Lee's statements to the police did not fit within the prosecution's second theory.

Finally, we examine whether Lee's statements to the police were admissible as statements against his penal interest. MRE 804(b)(3). This exception may be invoked where the declarant is unavailable to testify, MRE 804(a)(1), and where his out-of-court statements were made under circumstances subjecting him to such criminal liability that a reasonable person in his shoes would not have made the statement unless it were true. MRE 804(b)(3). Lee invoked his constitutional privilege to not testify and was thus unavailable. Lee's statements were then admissible if they were made under circumstances suggesting that they were reliable. *People v Poole*, 444 Mich 151, 160-162; 506 NW2d 505 (1993). The circumstances here do not suggest such reliability.[2] Lee's statements were made during a police interrogation. Even though the statements tended to implicate Lee, they also shifted primary blame to defendant, and were likely made in an effort to "curry favor with the authorities." *Spinks, supra*, 206 Mich App 492. In light of the circumstances, the trial court erred in admitting Lee's statement against defendant. However, as noted, Witherspoon gave the identical (and untainted) testimony. For that reason and for all the reasons listed in the first issue, we conclude that this nonstructural, constitutional error is harmless beyond a reasonable doubt. *Graves, supra,* 482.

III

Defendant finally claims that he was denied his right to notice of the charges against him. The information charged defendant with conspiring with his father and others to assault two named individuals. The lower court gave a general conspiracy instruction to the jury, but did not specifically name defendant's father as a coconspirator or instruct the jury that it must find that defendant intended to assault the *named* victims. Defendant did not make a timely objection with regard to this issue in the lower court. Therefore, unless the defects in the information were "of such magnitude as to mislead the jury or otherwise prejudice the defendant," the issue has been waived. *People v Pashigian*, 150 Mich App 97, 103; 388 NW2d 259 (1986).

The information accused defendant of conspiring with his father and "several purported gang members and/or affiliates." The court instructed the jury that it must find that "Defendant intended to agree with others to commit the crime of assault with intent to commit murder." Defendant claims that this "permitted the jury to convict . . . [the defendant] of a conspiracy with which he was never charged." *People v Samuel Smith*, 85 Mich App 404, 414; 271 NW2d 252 (1978), rev'd on other grounds, 406 Mich 945; 277 NW2d 642 (1979). We disagree.

Defendant was charged with conspiracy and was tried with two alleged coconspirators. The prosecution advanced the theory that these three conspired together to commit the charged crimes. All three were tried for and convicted of conspiracy at a consolidated trial. Defendant has not shown that the jury was misled or that defendant was prejudiced by the court not naming defendant's father as a fourth coconspirator. The information in any criminal prosecution must be specific enough to place the defendant on notice of the charges against him. See, *People v Traughber*, 432 Mich 208, 213-217; 439 NW2d 231 (1989). The record supports a conclusion that defendant and the jury were clearly aware that he was being tried for conspiring with the two codefendants being tried with him, and that all three were charged with conspiracy to assault with intent to murder.

Defendant also claimed that the trial court erred in not instructing the jury that it must find that the assaults were committed against the two victims specifically named in the information. Again, this was harmless error. The jury was instructed on the law of transferred intent. Therefore, if the jury found that defendant intended to assault another person with intent to commit murder or great bodily harm, then the jury could find defendant guilty of assaulting the victims named in the information.

Affirmed.

/s/ Joseph B. Sullivan

[1] A close examination of the record reveals that the two gangs were affiliated; however the prosecution failed to explain to the jury how the stabbing evidence explained defendant's intent at the time of the shooting.

[2] The prosecution does not dispute this, but rather, advances a harmless-error theory.