

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROLANDO JOHNSON,

Defendant-Appellant

UNPUBLISHED

December 27, 2002

No. 232921

Muskegon Circuit Court

LC No. 00-044699-FH

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant appeals by right his convictions, following a jury trial, of assault with a dangerous weapon, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, felony-firearm, MCL 750.227b, and third-degree fleeing and eluding, MCL 750.479a(3). The court sentenced defendant to a term of 2 to 4 years' imprisonment for assault with a dangerous weapon, concurrent terms of 23 months to 5 years' imprisonment for carrying a concealed weapon and third-degree fleeing and eluding, and to a consecutive 2-year term for felony-firearm. We affirm.

This case revolves around an incident involving defendant, defendant's girlfriend, and defendant's girlfriend's estranged husband. After apparently learning that his girlfriend had left a bar with her estranged husband, defendant went to his girlfriend's apartment and assaulted her husband with a gun.

Defendant first contends that the trial court erred in admitting evidence of other acts pursuant to MRE 404(b). Specifically defendant argues that evidence that he was known to carry a gun was admitted for an improper purpose and that any probative value of this evidence was outweighed by its prejudicial effect. "The decision whether such evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). However, decisions regarding the admissibility of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence precludes the admission of the evidence, which is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

“[E]vidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts.” *Id.*, citing MRE 404(b). However, such evidence may be admissible for other purposes under MRE 404(b)(1), which provides:

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.

“This rule permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct.” *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). To be admissible under MRE 404(b), the trial court must determine: (1) that the evidence is offered for a proper purpose; (2) that the evidence is relevant; (3) that the probative value is not substantially outweighed by unfair prejudice; and (4) the trial court may, upon request, provide a limiting instruction to the jury. *Starr, supra*, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). Regarding relevance, relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401.

Testimony established that defendant had previously used the same gun as used during the current incident. This testimony directly contradicted defendant’s first statement to police that he owned no guns and that he had no gun on the day of the incident. Testimony also established that defendant had that gun in his car on some of those previous occasions. This testimony rebutted defendant’s second statement indicating that he did not bring the gun with him, but rather it was already in the house when he arrived. Further, this testimony established that defendant had the opportunity to commit the charged crimes by possessing the gun and, possibly intent, because he had threatened one of the witnesses on a previous occasion. The evidence was not offered to show propensity; rather, it was offered for the proper purpose of refuting defendant’s statements to the police and to show defendant’s opportunity and intent to commit the crimes alleged.

This evidence was likewise relevant. Relevant evidence has two characteristics: it is material and has probative force. *Starr, supra* at 497. To be material, the evidence must be logically relevant to an issue or fact of consequence at trial, and any tendency to prove such a fact in issue is sufficient. *Id.* at 497-498. Possession of a gun was a fact of consequence to the charged crimes. Testimony that defendant was seen in possession of a gun on previous occasions had a tendency to make the existence of that fact (that he possessed the guns during the crimes) more probable. It further clearly related to defendant’s statements to the police that he did not possess a gun. Finally, this evidence was also relevant to the charge of carrying a concealed weapon (CCW), because that charge can be defeated by a showing that the place in which the defendant carried the weapon was in his own house. *People v Pasha*, 466 Mich 378, 382-383; 645 NW2d 275 (2002). Because there was some dispute regarding whether defendant was living where the assault occurred at the time it occurred, the prosecutor had to show that defendant brought the weapon with him on the day in question. The testimony that defendant

had removed that gun from the house some four months before the current incident and that he had that gun in his car only two days before the current incident was relevant in that regard.

Under the circumstances, the admission of this evidence was not substantially outweighed by unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Crawford, supra* at 398. Because the evidence was highly probative to refute defendant’s statements to the police and to support the CCW charge, the evidence cannot be considered marginal and therefore, there was little possibility that the jury would give it undue weight. Moreover, although defendant claims that the witness testimony was incredible, which therefore reduced its probative value, questions of credibility are for the factfinder to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Finally, the trial court provided an appropriate limiting instruction. This limiting instruction mitigated any chance the jury would consider the evidence for an improper purpose. We conclude that the trial court did not abuse its discretion in allowing testimony regarding defendant’s possession of a handgun on prior occasions.

Defendant next contends the trial court erred in allowing a witness to testify regarding the conditions of defendant’s bond. To preserve an evidentiary issue for review, the party opposing the evidence must timely object on the record and state the specific ground for objection. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Because defendant did not object to the testimony regarding defendant’s bond conditions on direct examination, this issue was not preserved. Further, defendant did not state relevancy as the ground for his objection to the prosecutor’s question on redirect examination. “Objections raised on one ground are insufficient to preserve an appellate attack based on different grounds.” *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992). Therefore, we conclude this issue is unpreserved.

This Court reviews unpreserved issues, constitutional and nonconstitutional, under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights, i.e., it affected the outcome of the lower court proceeding. *Id.*

The prosecutor asked questions about the witness’ relationship with defendant, a relationship that was allegedly in direct conflict with defendant’s bond condition, to show the witness’ bias for defendant. Evidence of bias is “almost always relevant.” *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). “The interest or bias of a witness has never been regarded as irrelevant.” *Id.*, quoting *People v MacCullough*, 281 Mich 15, 26; 274 NW2d 693 (1937). In this case, the witness was apparently a reluctant prosecution witness. She testified that she was still in love with defendant and that she planned to marry him. Because evidence of the witness’ bias was relevant, the prosecution properly inquired into the matter and the evidence was properly admitted. However, even if the admission of evidence regarding defendant’s bond conditions had constituted error, defendant failed to show prejudice in that this error was outcome determinative. See *Carines, supra*.

Defendant also contends that the prosecutor improperly referred to defendant’s alleged violation of his bond conditions in his rebuttal statement. This Court reviews claims of

prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutors are “free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), citing *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Defendant failed to object to this testimony, and because the testimony was properly in evidence, the prosecution was free to argue it.

Finally, defendant contends, for the first time, that his conviction for carrying a concealed weapon should be reversed pursuant to *Pasha*, *supra*. In *Pasha*, our Supreme Court analyzed the dwelling exception to the CCW statute, MCL 750.227(2),¹ and determined that “[i]n order to qualify for the dwelling house exception, the defendant must present evidence that the location where the concealed pistol was carried was defendant’s dwelling house.” *Pasha*, *supra* at 382-383. The Court further determined that lawful ownership of the pistol is not statutorily required. *Id.*

The Supreme Court held that the retroactive effect of *Pasha* was limited to certain cases currently pending on appeal. *Id.* “To seek retroactive application of our holding in a case currently pending on appeal, a defendant must demonstrate that 1) the dwelling house exception issue has been raised on appeal, and 2) the defendant either preserved the issue in the trial court or is entitled to relief under *Carines*.” *Id.* at 384-385.

In this case, the dwelling house exception was raised for the first time on appeal in defendant’s pro per supplemental brief, which was filed after *Pasha* was decided. Defendant did not specifically request the CCW count be dismissed on these grounds before or during trial, and admits in his supplemental brief on appeal that this issue is unpreserved and requests relief be granted under *Carines*. The Court in *Carines* stated that reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent person. *Carines*, *supra*. Here, there was conflicting testimony regarding whether the apartment in which the incident occurred was defendant’s residence at the time of the incident. The jury was aware of the evidence and resolved the conflict against defendant. Defendant has failed to show reversal is warranted.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot

¹ MCL 750.227(2) states:

A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.