

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE ERVIN,

Defendant-Appellant.

UNPUBLISHED

May 11, 2004

No. 245255

Wayne Circuit Court

LC No. 02-002260

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(a), felony-firearm, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to life in prison for the first-degree murder conviction, two years' imprisonment for the felony firearm conviction, and forty to sixty months' imprisonment for the felon in possession of a firearm conviction. We affirm.

Defendant's convictions stem from the shooting of the victim, Thomas Allen, outside of a bar. An argument broke out between Allen and another individual inside the bar and the bar owner escorted Allen out. A group of individuals from inside the bar, including defendant, also left. Sometime later, Allen was shot.

Defendant first argues that the trial court denied him due process and his right to a properly instructed jury because the trial court's instructions concerning the difference between first- and second-degree murder were erroneous, confusing and misleading. The failure to timely request an instruction constitutes a forfeiture of the issue, and an intentional relinquishment of the right waives the issue and extinguishes the error. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Here, defense counsel did not merely fail to object to the jury instructions, he explicitly expressed satisfaction with the instructions given to the jury. These actions by defense counsel resulted in a waiver, rather than forfeiture, and thus, the waiver extinguished any error. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Regardless, the trial court did not err in its instructions. A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in a reasonable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631

NW2d 67 (2001). The court properly instructed the jury concerning first- and second-degree murder.

Next, defendant argues that he was denied a fair trial because the trial court allowed irrelevant other acts evidence to be admitted against defendant.

For an evidentiary issue to be preserved, defense counsel must have timely objected at trial. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). To be timely, an evidentiary objection must be interposed between the question and the answer. *Id.* Ordinarily, an objection to evidence or argument should be accompanied by a request for a curative instruction. See *People v Harris*, 158 Mich App 463, 466; 404 NW2d 779 (1987), and *People v Hayward*, 127 Mich App 50, 59; 338 NW2d 549 (1983). Defendant failed to object to the admission of this evidence at trial, and therefore, the issue is unpreserved. *Aldrich, supra* at 113. Unpreserved issues are reviewed for a plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Use of other acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b)(1), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Evidence is not subject to MRE 404(b) analysis merely because it discloses a bad act; bad acts can be relevant as substantive evidence, admissible under MRE 401, without regard to MRE 404. *Knox, supra* at 509; *VanderVliet, supra* at 64. The list of exceptions in MRE 404(b) is nonexclusive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888, on second rem 242 Mich App 656; 620 NW2d 19 (2000).

Evidence was presented to the jury that defendant allegedly told a witness, prison inmate Timothy Murrell, about killing Allen. Murrell testified that during this conversation, defendant told Murrell that he engaged in other violent acts in the past, including seventeen other murders and a robbery. This information regarding other crimes was verified through the testimony of a police officer, Miguel Bruce. In addition, Jamal Jackson testified that because defendant had shot at him in the past, he was afraid of defendant. This evidence was offered for a proper purpose. The evidence regarding defendant shooting at Jackson in the past was introduced to bolster the credibility of Jackson's testimony. When it is legally relevant, other acts evidence is admissible as a proper purpose to rebut a charge on implied fabrication. *Starr, supra* at 501-502. Jackson's credibility was called into question during defense counsel's opening statement. The evidence that defendant had previously shot at Jackson was offered to show that Jackson had appropriate reason to fear defendant, and was credible even though his story changed.

Similar to Jackson, Murrell's credibility was also called into question. The defense made it clear in opening statements that Murrell's statement would be challenged. Therefore, it was appropriate for Murrell to give testimony regarding evidence of the robbery and other murders,

which could not be found in the preliminary examination transcripts, to bolster the credibility of his testimony. It was also admissible for Bruce to support Murrell's testimony by verifying defendant's involvement in the robbery.

The evidence offered by Jackson, Murrell, and Bruce was likewise relevant. Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Evidence is admissible if it is helpful in throwing light on any material point, *Aldrich, supra* at 114, and all facts on which any reasonable presumption of the truth or the falsity of a charge can be founded are admissible, *People v Lewis*, 264 Mich 83, 88; 249 NW 451 (1933). The credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod and rem'd 450 Mich 1212 (1995).

Again, the evidence that defendant had previously shot at Jackson was relevant to show that Jackson had reason to be afraid of defendant. Jackson's credibility had been called into question when Jackson changed his story, and the evidence explained why Jackson should be found to be credible. The evidence regarding defendant being involved in a robbery and seventeen other murders was also relevant to show that Murrell had information about defendant that went beyond the preliminary examination transcripts, and therefore Murrell was not fabricating the story. This evidence was brought forth only after defense counsel discussed it in his opening statement. Bruce's testimony verifying defendant's involvement in the robbery also helped to bolster Murrell's credibility. Therefore, the testimony from Jackson, Murrell, and Bruce was relevant to the credibility of the witnesses, which had been called into question by the defense.

Further, the testimony offered by Jackson, Murrell, and Bruce had probative value that was not outweighed by its unfair prejudicial effect. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Sabin, supra* at 58. "Unfair prejudice" does not mean "damaging." *Mills, supra* at 75. Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Lewis, supra* at 83; *Mills, supra* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

Here, the evidence presented regarding defendant shooting at Jackson gave proof to the statement that Jackson was afraid of defendant, which reflected directly on Jackson's credibility. The evidence regarding the robbery and the other murders was the most effective and efficient way that Murrell could prove his credibility, which the defense had called into question. Because the evidence brought forth in the testimony of Jackson, Murrell, and Bruce was offered for a proper purpose, was relevant, and its prejudicial effect was outweighed by its probative value, it was within the court's discretion to find the evidence was admissible under MRE 404(b)(1).

Defendant also argues that the prosecution failed to provide notice of its intent to use other acts evidence, as required by MRE 404(b)(2). Generally, a prosecutor must provide reasonable notice of his intent to present other acts evidence. MRE 404(b)(2). The purpose of

the notice requirement is to force the prosecutor to identify and seek admission only of relevant other acts evidence, to ensure that the defendant has an opportunity to object to and defend against the evidence, and to facilitate a thoughtful ruling grounded on an adequate record. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001). The notice requirement does not apply to evidence introduced to rebut the defendant's evidence. *People v Lukity*, 460 Mich 484, 499; 596 NW2d 607 (1999); *People v McRunels*, 237 Mich App 168, 183; 603 NW2d 95 (1999).

All of the MRE 404(b) witnesses were listed on the prosecution's witness list filed in advance of trial, and defense counsel made reference in his opening statement to the evidence to which Murrell testified. Defendant has not affirmatively demonstrated that defense counsel was not on notice of the prosecution's intent to use evidence of other acts with regard to Murrell and Bruce, who verified Murrell's testimony.

Defendant was also on notice of Jackson's testimony. Jackson testified in the preliminary examination that defendant had shot at him before, and Jackson was listed on the prosecution's witness list. Furthermore, any error stemming from the prosecutor's failure to give advance notice of this evidence, as required by MRE 404(b)(2), did not affect defendant's substantial rights, inasmuch as it is apparent that defendant was aware of the evidence before trial and there is no indication in the record that defendant was either surprised or unprepared to meet it. Defendant has not demonstrated how he would have proceeded differently if the prosecutor had given him technically proper notice. *Hawkings, supra* at 455-456. There is no error requiring reversal.

Defendant also argues that defense counsel was ineffective for failing to object to the other acts evidence or request a limiting instruction.

To fully preserve this issue for review, a defendant should move for a new trial or evidentiary hearing. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Defendant did not move for a new trial or a *Ginther*¹ hearing, therefore our review is limited to mistakes apparent on the record. *Id.* at 658-659.

To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant claims that counsel was ineffective by failing to object to the other acts evidence. As demonstrated, *supra*, the other acts evidence was admissible. Defense counsel need not register a meritless objection to act effectively. *Hawkings, supra* at 457, citing *People v*

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Snider, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, defense counsel did not err in failing to object to properly admitted evidence.

If other acts, crimes, or wrongs evidence is admitted into evidence, on request, the trial court may provide a limiting instruction. *VanderVliet, supra* at 75. Defendant has not overcome the strong presumption that his trial counsel's failure to request a limiting instruction was sound trial strategy. It is reasonable that defense counsel made a tactical decision not to repeatedly highlight defendant's other acts for the jury, considering the fact that the testimonial evidence regarding the evidence was not highlighted in the testimony, but rather used to bolster the credibility of the witnesses. We do not substitute our judgment for defense counsel's with regard to decisions of trial strategy or assess defense counsel's performance with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Failure of trial strategy does not necessitate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has failed to overcome the presumption that counsel rendered effective assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood