

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PALOK GASHAJ,

Defendant-Appellant.

UNPUBLISHED

June 8, 2004

No. 247487

Wayne Circuit Court

LC No. 02-009233

Before: Smolenski, P.J., and White and Kelly, JJ.

MEMORANDUM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to life imprisonment for the murder conviction to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant shot and killed his wife in Oakland County after an apparent argument between defendant, his wife, and, via cell phone, her brother, Roland Popaj, over whether defendant's wife would be working at her family's restaurant that day. Defendant then drove to the restaurant in Wayne County, entered, and shot Popaj in the back twice, killing him. The instant case involves the brother.

Defendant asserts that the trial court erred by failing to give a limiting instruction to the jury as to the proper use of MRE 404(b), or prior bad acts, evidence - - in this case the evidence of defendant's earlier shooting of his wife.¹ We disagree. Defendant's trial counsel did not request a limiting instruction or object to the absence of such a limiting instruction. This issue is thus unpreserved, and defendant must demonstrate plain error which affected his substantial rights - - that defendant was innocent or that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings regardless of defendant's innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

¹ Defendant does not claim error in the admission of this evidence, only in the failure to give a proper instruction regarding its use.

In the absence of either a request or an objection, a trial court is under no duty to give a limiting instruction sua sponte. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Further, on this record there is no reason to assume that the jury used the evidence as improper character evidence, rather than as evidence bearing on intent and premeditation.

Defendant also asserts that his trial counsel's failure to request the limiting instruction constituted ineffective assistance of counsel. We disagree. Generally, to establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2002). As noted above, we are satisfied that the failure to give the instruction did not affect the outcome of the trial.

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly