

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GAIL WILSON,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 247131

Wayne Circuit Court

LC No. 02-008940

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to thirty to fifty years' imprisonment for the second-degree murder conviction, three to ten years' imprisonment for the felon in possession of a firearm conviction, and two consecutive years' imprisonment for the felony-firearm conviction. We affirm.

I. Facts and Procedure

On July 5, 2000, Edward Burton drove Cornelius Terry Moore to the home of defendant and her boyfriend, Fred Jones. When Burton and Moore arrived at the house, Burton stopped the car on the street at the side of the house and sounded the car horn to summon Jones. Defendant's son and codefendant, Deandre L. Wilson, emerged from behind the house, appearing agitated and yelling profanities at Burton for blowing the horn in front of his mother's house. Burton and Deandre argued, and Deandre walked up to the driver's side of the car and punched Burton in the face. Burton pulled into the driveway of the home, striking defendant's parked vehicle. Deandre picked up a cinderblock and threw it at Burton's front windshield, breaking the glass. When Deandre approached the passenger side door of the car, Moore grabbed him. Deandre told defendant, who was now standing outside the house, to "get the gun." Defendant ran into the house and emerged seconds later with a gun. Moore observed defendant holding the gun outstretched toward Deandre. Burton backed up his car and drove away. Deandre then got into a small red car and drove away in the opposite direction.

After having driven only a few blocks, Moore saw a small red car following them. Burton unsuccessfully attempted to evade the red car and eventually pulled into an alley. Egress

from the alley was blocked by a parked van. Moore got out of the car. While Burton was attempting to turn his car around, Deandre entered the alley on foot carrying a gun. Moore ran away, but heard gunshots from the alley. Following the shots, a witness saw Deandre run out of the alley, throw something into the backseat of the red car, and drive away quickly. Soon after, Moore returned to the alley and found Burton in the driver's seat of the car with a fatal bullet wound in his head.

II. Analysis

A. Evidence of the Bad Acts of Codefendant

Defendant first argues that the trial court abused its discretion in admitting evidence of her codefendant Deandre Wilson's subsequent bad acts at their joint trial. We review for an abuse of discretion the trial court's decision whether to admit evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). When the underlying decision involves a question of law, such as whether a rule of evidence precludes admission, we review the question de novo. *Id.*

The evidence was admitted 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.

For "bad acts" evidence to be admissible, the following factors must be present: (1) the prosecutor must offer the evidence under something other than a character or propensity theory; (2) the evidence must be relevant under MRE 402;¹ and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403.² *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Defendant contends that the admission of evidence that Deandre shot and wounded three people and shot and killed a sixteen-year old girl on September 17, 2000, should not have been admitted under MRE 404(b), because it was not relevant to her guilt and was unfairly prejudicial, as it would cause the jury to blame defendant for Deandre's actions. We disagree. The disputed

¹ Evidence is relevant if it has "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.

² "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MCR 403.

evidence showed that, in early September 2000, Deandre approached a resident of the house where Moore lived on Acacia Street, and asked her if Moore lived there. When the woman asked defendant to identify himself, defendant responded, “[J]ust tell him I’ll be back.” On September 17, 2000, defendant and an unidentified woman³ forced their way into the Acacia Street house, where defendant struggled with and shot three people in the house and fatally shot Moore’s sixteen-year-old daughter in the head while she was sleeping in her bed. During the incident, defendant was apparently looking for someone, as he kept repeating, “Where is he at?” Defendant never encountered Moore, who was in bed in the basement.

The prosecution offered this evidence for the proper purpose of proving Deandre’s identity and to show his consciousness of guilt. By presenting evidence that Deandre shot several people during an attempt to find and kill Moore, who was the only witness who both saw Deandre with a gun at the scene of the murder and could identify Deandre as the perpetrator, the prosecution supported its theory that Deandre was correctly identified as the person who murdered Burton. Additionally, because defendant’s guilt stemmed from her act of giving Deandre a gun, defendant’s guilt was contingent on the prosecution proving beyond a reasonable doubt that Deandre shot and killed Burton with that gun. Therefore, the evidence was introduced for a proper purpose and was relevant.

We also conclude that the trial court did not err in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. The evidence of the Acacia Street house shootings may have been somewhat inflammatory, especially given the cold-blooded nature of Deandre’s shootings and the execution-style killing of a sleeping sixteen-year-old girl. However, “[t]he fact that evidence is damaging and harms the opposing party does not indicate that it is unfairly prejudicial.” *Chmielewski v Xermac, Inc.*, 216 Mich App 707, 710; 550 NW2d 797 (1996), *aff’d* 457 Mich 593; 580 NW2d 817 (1998). All evidence presented by the prosecution is “prejudicial” against the defendant to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), *mod* 450 Mich 1212 (1995). But “[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Evidence of the Acacia Street house shootings was not marginally probative, as it was relevant to show identification, and identification was an important issue at defendant’s trial. Furthermore, the trial court attempted to minimize any prejudice to defendant by repeatedly stressing that she was not involved in, or charged with, the Acacia Street house shootings. The trial court instructed the jury that it should consider each defendant separately and that it should not consider evidence limited to one defendant to determine the guilt of the other defendant. The trial court further instructed the jury that it should only consider the evidence of the Acacia Street house shootings to determine the identity of the people who committed the crimes and not for any other reason. Juries are generally presumed to follow their instructions. *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001). Further, the prosecutor deliberately elicited testimony from the Acacia Street house residents to make clear that defendant was not the

³ The prosecution made clear that this woman was not defendant.

woman involved in the Acacia Street house shootings. Because it was clear that defendant was not involved in the Acacia Street house shootings, and the jury was instructed not to consider this evidence to determine defendant's guilt, the admission of this evidence was not unfairly prejudicial toward defendant. Therefore, we conclude that the trial court did not abuse its discretion in determining that the evidence was admissible under MRE 403.

B. Defendant's Motion for Separate Jury

Defendant also argues that the trial court abused its discretion in denying her request for a separate jury under MCR 6.121(C). "The use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials." *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). Thus, we review for an abuse of discretion a trial court's decision whether to use separate juries. *Id.* at 346, 351-352. "There is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Under MCR 6.121(C), a separate jury is required only when a defendant clearly and affirmatively shows that the use of a joint jury will prejudice his substantial rights and that separate juries are necessary to rectify the potential for prejudice. *Hana, supra* at 346, 351-352. Severance under MCR 6.121(C) is required when the codefendants' defenses are "mutually exclusive" or "irreconcilable." *Id.* at 349. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.*⁴

Defendant concedes that the positions of defendant and Deandre were neither antagonistic nor mutually exclusive; defendant argued at trial that Deandre was not Burton's murderer and, in the alternative, that even if Deandre was the murderer, defendant did not assist him. But defendant argues that separate juries were necessary because her jury should not have been exposed to the evidence of the Acacia Street house shootings, which solely involved Deandre. As discussed, *supra*, the prosecution introduced evidence of the Acacia Street house shootings to prove Deandre's identity as Burton's murderer. Because defendant's guilt was linked to that of Deandre, the identity of the murderer was also relevant to defendant's guilt. Additionally, the trial court instructed the jury regarding the proper use of, and limitations on, the

⁴ MCR 6.121(D) also allows for severance:

Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

Defendant does not argue on appeal that he was entitled to discretionary severance under MCR 6.121(D).

evidence of the Acacia Street house shootings, and the prosecutor elicited evidence specifically acknowledging that defendant was not involved in the Acacia Street house shootings. As such, defendant's substantial rights were not prejudiced by the admission of this evidence and the trial court did not abuse its discretion in denying defendant's motion for a separate jury.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Brian K. Zahra