STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2007
v	No. 271036 Kent Circuit Court
FREDERICK DEARMONDE SMITH, a/k/a FREDERICK DEARMOND SMITH, Defendant-Appellant.	LC No. 05-009554-FC

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assault with intent to commit murder, MCL 750.83. We affirm.

Defendant argues that insufficient evidence existed to sustain his conviction. We review de novo challenges to the sufficiency of the evidence to determine whether, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all the elements of the charged crime to have been proven beyond a reasonable doubt. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005).

The elements of assault with intent to commit murder are: 1) an assault, 2) with an actual intent to kill, and 3) which, if successful, would make the killing murder. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *Id*. The intent to kill may be proved by inference from any facts in evidence. *Id*. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). All conflicts in the evidence must be resolved in favor of the prosecution, and we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Id*.

Here, despite conflicting details about what precipitated the incident, the evidence established that defendant and the victim were in a physical altercation in which defendant was armed with a knife, and the victim was unarmed. Defendant inflicted two severe injuries on the victim, cutting to the bone on the victim's arm and chest. The victim was hospitalized for three days. The jury could infer defendant's intent to kill from the extent and severity of the victim's injuries. See *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995). Additionally, evidence of

defendant's flight and exculpatory statements to the police indicated his consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Viewing the circumstantial evidence and reasonable inferences drawn from the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of assault with intent to commit murder were proven beyond a reasonable doubt. For these same reasons, we reject defendant's claim that the trial court erred in denying his motion for a directed verdict. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002).

Defendant next argues that the trial court abused its discretion in admitting evidence of other acts.[1] We review for an abuse of discretion a trial court's decision to admit other acts evidence. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). To be admissible under MRE 404(b) other-acts evidence generally must be (1) offered for a proper purpose, (2) relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

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. The challenged evidence was offered, in part, as evidence of intent and absence of mistake or accident, which was relevant because it negated the reasonable assumption that the attack was not deliberate. *McGhee*, *supra* at 611. The evidence showed that defendant was involved in numerous confrontations and physical altercations, some involving a knife, wherein he became enraged, acted aggressively, and threatened violence. Contrary to defendant's assertion that the other-acts evidence was irrelevant to defendant's intent during the incident at issue, "[t]he more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently, and conversely, the more likely it is that the defendant's act is intentional." *Id*.; see *People v VanderVliet*, 444 Mich 52, 79 n 35; 508 NW2d 114 (1993). Further, where other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant. *Id*. at 80.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or delay, waste of time, or needless presentation of cumulative evidence. MRE 403. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *McGhee*, *supra* at 613-614. Unfair prejudice exists when evidence has a tendency to invoke "considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Id*. (citations omitted). There is no indication that the proposed evidence injected such extraneous considerations. The evidence, while prejudicial, was highly probative of defendant's behavior, and its probative value was not substantially outweighed by the danger of unfair prejudice. Further, the trial court issued a cautionary instruction, thereby eliminating any danger of unfair prejudice that may have

[1] The prosecution sought to introduce evidence to demonstrate that defendant resided in and habitually frequented the area where the incident occurred, that defendant intended to assault the victim with the intent to commit murder, to show identity, and to show absence of mistake or accident. The reasons stated—opportunity, intent, knowledge, identity, and absence of mistake or accident—are proper non-character inferences. MRE 404(b)(1).

stemmed from the other-acts evidence. Accordingly, the trial court did not abuse its discretion in allowing the other-acts evidence.

We also conclude trial court did not abuse its discretion by permitting the admission of testimony that the police were unsuccessful in locating certain witnesses related to the MRE 404(b) evidence. The evidence was relevant to providing the jury with an explanation for why certain individuals, who would be referred to during testimony, would not testify at trial.

Although he did not specifically object to its admission below, on appeal defendant takes issue with how the other acts evidence presented at trial was selected. The brief mention that defendant had 24 contacts with the police since 2003 and that the eight most illustrative of his conduct were selected to be presented at trial, did not constitute plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 759-763-764; 597 NW2d 130 (1999).

Defendant next argues that the trial court abused its discretion in denying his request to be unshackled at trial. We review for an abuse of discretion a trial court's decision concerning whether a defendant should be shackled during trial. *People v Banks*, 249 Mich App 247, 256-257; 642 NW2d 351 (2002).

The trial court properly exercised its discretion in denying defendant's request to have his leg shackles removed. As in *People v Williams*, 173 Mich App 312, 315; 433 NW2d 356 (1988), "[d]efendant's past history of assaultive and disruptive behavior . . . [was a] credible justification for the court's decision to restrain defendant for the purpose of having a peaceable trial, despite the absence of any indication on defendant's part that he would attempt an escape." Moreover, the trial court's concern that defendant presented a security risk considering the violent nature of the offense at issue was a credible justification to restrain defendant so he could not injure others. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994).

Likewise, defendant argues that the trial court abused its discretion in denying his request to unshackle his defense witness at trial. On the record, the trial court properly denied defendant's request to have the witness' leg shackles removed. Again, the trial court had credible justification for its decision: preventing the witness from injuring others in the courtroom and ensuring an orderly trial. *Banks, supra* at 256-257. And, as the trial court noted, defendant was not prejudiced by the ruling because it would be evident to the jury from the witness' clothing, handcuffs, and the presence of guards that he was incarcerated.

Defendant next argues that the trial court erred in allowing into evidence the statement he made to the police following his arrest. However, defendant's statements to the police after his lawful arrest and waiver of *Miranda*[2] rights was properly admissible under MRE 801(d)(2)(A) as that of a party-opponent. Defendant has failed to demonstrate plain error affecting his substantial rights; therefore, he is not entitled to relief on this issue.

Defendant also accuses the prosecutor of various instances of misconduct. Because defendant failed to make contemporaneous objections and request curative instructions

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

concerning the alleged instances of prosecutorial misconduct, we review only for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). To avoid forfeiture of an unpreserved claim, defendant must demonstrate plain error that was outcome determinative. *Id*. We review the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *Id*.

Defendant argues that the prosecutor engaged in misconduct by introducing evidence under MRE 404(b) and exceeding the scope of the trial court's ruling regarding such evidence. A prosecutor's good faith effort to admit evidence cannot constitute misconduct. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because the evidence was properly admitted, the prosecutor did not engage in misconduct by introducing it. Further, the prosecutor did not exceed the scope of the trial court's ruling.

Defendant next argues that the prosecutor acted improperly by eliciting testimony that defendant sent a letter to his friend asking her to testify favorably in his behalf and to contact his attorney regarding another witness' preliminary examination testimony, and that he introduced the actual letter as an exhibit. However, defendant's letter constituted a statement by a party-opponent properly admissible under MRE 801(d)(2), and a prosecutor's good faith effort to admit evidence cannot constitute misconduct. *Ackerman*, *supra* at 448. Because the evidence was properly admitted, there is no basis to conclude that the prosecutor acted in bad faith. *Id*.

Defendant also argues that the prosecutor denigrated defendant and his defense. Specifically, defendant takes issue with the prosecutor's comments during his opening statement and closing argument that defendant was well-known by the police, had a chronic alcohol problem, was a "terrorist, a racist, a violent, belligerent individual," "a violent, racist bully," "a terror in the community," and "a violent predator"; that the witnesses "portray[ed] [defendant] as a dangerous monster"; that defendant's theory of self-defense was "a sad joke" that was "ludicrous" and "absurd"; and his query to members of the jury regarding whether they would rather have defendant or the victim for a neighbor. While a prosecutor may not argue facts that are not in evidence, he may argue the evidence and reasonable inferences. *Id*. at 450. The prosecutor is not constrained to use bland terms when doing so. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Evidence was presented that defendant was well known to the police, had an alcohol problem, had serious anger issues, made racially untoward comments, and was a violent person who was frequently involved in verbal and physical altercations. Further, the prosecutor was free to argue from the facts that defendant's theory of self-defense, as testified to by the defense witness, was not worthy of belief. *Id*. Finally, the prosecutor's question to the jury regarding whom they would rather have for a neighbor was clearly rhetorical and designed to induce the jury to compare and contrast the personality and demeanor of defendant and the victim, to determine which version of events they found to be credible. The prosecutor's comments and arguments were based on the evidence and reasonable inferences.

Defendant next argues that the prosecutor engaged in misconduct by arguing facts not in evidence. We disagree. The prosecutor need not use the least prejudicial evidence available to establish a fact at issue, *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995), and the prosecutor has wide latitude in arguing the facts and reasonable inferences, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). As noted already, the prosecutor need not confine argument to the blandest possible terms. *Launsburry*, *supra* at 361.

The evidence supported the prosecutor's statements that the victim was almost killed and that the victim's injuries were life threatening. The victim suffered two serious cuts: a ten-inch long cut to his chest and a six-inch cut to the arm, both to the bone. He spent three days in the hospital. The prosecutor's reference to the victim regarding "the incident where [he] got stabbed" was also supported by the evidence.

The prosecutor's comment that he had a duty to bring out the MRE 404(b) testimony was a proper characterization of the law. While a prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial, *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002), "[t]he truth-finding function of our legal system is best served when as much evidence as possible relevant to the charged crime is submitted to the finder of fact, and the prosecutor has a duty to the public to present all such evidence of a crime that he obtains." *People v Stevens*, 461 Mich 655, 668; 610 NW2d 881 (2000).

Viewing in context the prosecutor's remarks during voir dire that real life is not akin to CSI television shows and that he was not trying to "pull the wool" over the juror's eyes, *Watson*, *supra* at 586, it is clear that the prosecutor was merely attempting to ensure that the jury not hold the prosecution to a higher burden of proof than was required. The remarks were entirely proper and did not prejudice the jurors against defendant.

Defendant argues that the prosecutor engaged in misconduct by eliciting a police officer's opinion regarding the victim's credibility. It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because matters of credibility are to be determined by the trier of fact. *People v Williams*, 153 Mich App 582, 590; 396 NW2d 805 (1986). Here, the prosecutor did not ask the officer to offer an opinion on whether the victim was credible, but rather, he asked whether the victim was ever untruthful to that particular officer during their interactions. Also, the prosecutor's question whether it would have been fair for the investigating officers to think that the witness was intoxicated was not improper because the question pertained to whether others' assessments of his own sobriety were accurate.

Defendant argues that the prosecutor engaged in misconduct by making improper civic duty arguments. Specifically, defendant takes issue with the prosecutor's comments that the jury should not reward defendant because the victim did not die, because it would make a nullity out of the crime, that the other acts evidence showed defendant's intent and gave the jurors a clear picture of what kind of person the defendant was, what he was capable of doing, what he had done on a consistent basis, and what he did on the date of the incident; and whether an honest and reasonable person would rather have defendant or the victim for a neighbor. We conclude the challenged statements constituted permissible commentary on the evidence and the inferences drawn from the evidence. *McGhee, supra* at 636. The case turned on whether the jury believed that defendant intentionally injured the victim with the knife when the victim tried to break up the fight between defendant and another man, or whether the victim was injured when defendant used the knife in self-defense to ward off the victim's physical attack. The prosecutor's comments did not inject issues broader than the guilt or innocence of defendant into the trial, and no error occurred. *Id*.

Defendant also takes issue with the prosecutor's introduction of evidence that the victim did not have a police record, and the prosecutor's comment that the jury should not share or waste its pity on defendant and that it would be better placed with the victims of defendant's past

actions. It is improper for a prosecutor to seek the jury's sympathy for a victim. *Watson*, *supra* at 591. However, when viewed in context, the brief statement defendant challenged does not appear to have been so inflammatory as to require reversal in light of the trial court instructing the jury to base its verdict solely on the evidence. *Id*. at 591-592.

Defendant also takes issue with the prosecutor's questions during voir dire concerning the potential jurors' knowledge about the impact of alcohol on memory and perception of events, as well as his analogy of purchasing a home with imperfections to the burden of proof beyond a reasonable doubt. We find the prosecutor remarks were proper because it is clear that the he was merely attempting to ensure that the jury would not hold the prosecution to a higher burden of proof than was required.

Finally, defendant argues that the cumulative effect of the various instances of alleged prosecutorial misconduct constitutes error requiring reversal. However, where the prosecutor's conduct does not deny defendant a fair and impartial trial, reversal is not warranted. *Watson*, *supra* at 594. Even when viewed cumulatively, defendant has not shown any instances of misconduct which denied him a fair trial.[3] In sum, because defendant failed to demonstrate any plain error that was outcome determinative, reversal is not required.

Defendant next argues that he was denied the effective assistance of counsel. Defendant failed to move for a new trial or *Ginther*[4] hearing in the trial court; therefore, this issue is unpreserved, *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Our review is limited to mistakes apparent on the record. *Id*. at 659. To prove ineffective assistance of counsel, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that, but for that deficient performance, the result of the trial would have been different. *Id*.

Defense counsel did not object to testimony concerning how the other acts evidence to be presented at trial was selected but as noted *supra*, this evidence was properly admissible. Although defense counsel did not object to the manner in which the specific events were selected for trial, defendant has failed to overcome the strong presumption that defense counsel's failure to object constituted reasonable trial strategy. In light of the brief reference to the selection process, defense counsel may have reasonably determined that an objection would have drawn more attention to the fact that defendant had 24 contacts with the police in the two years preceding the event. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Id*. Moreover, in light of the weight of the evidence produced at trial, no reasonable likelihood exists that the brief reference to defendant's other police interactions affected the outcome of the case.

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[3] For this reason, we likewise reject defendant's argument that the trial court erred in failing to take independent action in response to the various instances of alleged prosecutorial misconduct.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defense counsel also did not object to the admission of the statement defendant made to the police. However, defendant's statement was properly admissible, and defense counsel is not ineffective for failing to make a futile objection. *Ackerman*, *supra* at 455. Defense counsel also did not object to the prosecutor's comment that the jury should not share or waste its pity on defendant, but that it would be better placed with the victims of defendant's past actions. But as noted already, this unpreserved allegation of prosecutorial misconduct did not require reversal, and counsel is not ineffective for failing to raise futile objections. *Id.* Moreover, the trial court instructed the jury to base its verdict solely on the evidence, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant has failed to demonstrate that his counsel's performance was deficient, and that there is a reasonable probability that, but for that deficient performance, the result of the trial would have been different. Accordingly, error meriting reversal did not occur.

We affirm.

/s/ Patrick M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey