

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONDO JUERONIMORE SMITH-BEY,

Defendant-Appellant.

UNPUBLISHED

April 10, 2008

No. 274243

Oakland Circuit Court

LC No. 2006-207430-FC

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to consecutive prison terms of 225 months to 50 years for the assault conviction, and two years for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting evidence of his prior assault against the victim, and his attempt to speak to the victim at the courthouse before his preliminary examination in the prior assault case. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). In deciding whether to admit evidence of other bad acts, a trial court must decide: (1) whether the evidence is being offered for a proper purpose, and not to show the defendant's propensity to act in conformance with a given character trait; (2) whether the evidence is relevant to an issue of fact that is of consequence at trial; (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and (4) , whether a cautionary instruction is appropriate. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

The evidence in this case showed that defendant believed that the victim had reneged on a promise to give defendant \$1,000. Defendant later confronted the victim at the victim's office and threatened the victim with a weapon in order to induce the victim to give him \$1,000. Defendant was later charged with armed robbery and felonious assault for that incident. Before defendant's preliminary examination in the prior assault case, defendant approached the victim in the courthouse and attempted to talk to him. The victim refused to speak to defendant and

reported the contact to the judge. Following the preliminary examination, defendant was bound over for trial. Two days later, the victim was shot in the parking lot of his office, leading to the charges in the present case.

The trial court determined that the evidence of the prior assault and the courthouse contact was admissible under MRE 404(b)(1), to prove motive and intent, but also determined that the evidence was admissible independent of MRE 404(b) as part of the *res gestae*, to provide the jury with a complete picture of the circumstances surrounding the charged crimes. See *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

Initially, we note that defendant does not challenge the trial court's ruling that the evidence was admissible as part of the *res gestae*. Because this serves as an independent ground for admitting the evidence, and defendant does not address this necessary issue on appeal, appellate relief is not warranted. See *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

In any event, defendant has failed to show that the trial court abused its discretion. We agree with the trial court that the evidence of the prior assault and the courthouse contact was admissible as part of the *res gestae* of the current offense. Although there was evidence that defendant believed that the victim owed him \$1,000, that evidence, by itself, did not show either the lengths to which defendant was willing to go to collect the money or the extent of the animosity that defendant harbored against the victim. Further, evidence that the victim was unwilling to cooperate with defendant to avoid defendant's criminal prosecution in the prior case just two days before the victim was shot provided additional evidence of motive, independent of the dispute over the alleged \$1,000 debt. Under the circumstances, the evidence of the prior assault and the courthouse contact was so connected to and necessary to explain the circumstances of the charged crimes to be admissible as part of the *res gestae*. See *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Without such evidence, the jury would not have a complete understanding of the situation between defendant and the victim that preceded the shooting.¹

Defendant next argues that the trial court erred when it instructed the jury that it had made a preliminary determination that the evidence of the prior assault was admissible to prove motive and intent. Because defendant did not object to this instruction at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767, 772-773; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Jury instructions are reviewed as a whole rather than piecemeal. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). The reviewing court must balance the meaning of the instructions as a whole against the potentially misleading effect of an isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat

¹ Because we conclude the evidence of the prior assault and courthouse conduct was admissible as part of the *res gestae*, we decline to address the legal arguments under MRE 404(b).

imperfect, instructions are not grounds for reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Considered in context, the trial court's preliminary instruction was merely intended to explain the posture of the evidence being presented. Defendant has failed to show a plain error. Furthermore, the instruction did not affect defendant's substantial rights. Contrary to what defendant argues on appeal, the trial court later instructed the jury that the court's comments and rulings are not evidence and were not intended to influence the jury's decision. The jury was also instructed that it was the sole judge of the facts, and the sole judge of the credibility of witnesses. Additionally, the court twice gave a cautionary instruction informing the jury on the proper use of evidence of defendant's other bad acts. Jurors are presumed to follow the court's instructions unless the contrary is clearly shown. See *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Defendant has made no such showing here. Viewed as a whole, the trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights.

Defendant next argues that the prosecutor improperly presented rebuttal testimony that defendant declined to give a statement to the police, thereby violating his constitutional right to remain silent. Defendant did not object to the rebuttal testimony below. Therefore, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Generally, a defendant's post-arrest silence may not be used to impeach his exculpatory testimony at trial. *Sholl*, *supra* at 737; see also *People v Belanger*, 454 Mich 571, 577-578; 563 NW2d 665 (1997). However, a defendant may not use the right against self-incrimination "to his advantage, and provide himself a shield against contradictions of his untruths." *People v Sutton (After Remand)*, 436 Mich 575, 592-594; 464 NW2d 276 (1990). Thus, where a defendant testifies that he was not given an opportunity to tell his side of the story to the police, he opens the door to testimony that he refused to make a statement. *People v Allen*, 201 Mich App 98, 102-103; 505 NW2d 869 (1993); see also *People v Crump*, 216 Mich App 210, 213-215; 549 NW2d 36 (1996).

In this case, defendant testified at trial that he was at a car dealership and also used an ATM machine, both of which may have had security cameras that would have shown that he was elsewhere at the time of the offense. He claimed, however, that the police did not give him an opportunity to tell his side of the story, explain where he was, who he was with, or what he was doing. He implied that if the police had elicited and investigated his story, they would have discovered that he could not have committed the charged crimes. In rebuttal, the prosecutor presented evidence that defendant was given an opportunity to answer questions concerning his whereabouts at the time of the offense, but declined to answer. In light of defendant's testimony, the rebuttal testimony was not plain error. *Crump*, *supra*; *Allen*, *supra*.

Lastly, defendant argues that the trial court erroneously scored offense variables 3, 6, and 19 of the sentencing guidelines. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251

Mich App 462, 468; 650 NW2d 700 (2002); see also *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000).

The trial court scored 25 points for offense variable 3, which is proper where a “[l]ife threatening or permanent incapacitating injury occurred to a victim.” MCL 777.33(1)(c). The evidence showed that the victim was shot twice in the back and once in the shoulder, and that all three bullets exited through his chest. One bullet left him paralyzed, and two others narrowly missed his spine and his heart. At the time of trial, he was still confined to a wheelchair, but was beginning to walk with braces and a walker, and doctors were hopeful that he might someday walk again. Even if the victim might someday regain his ability to walk, the evidence sufficiently showed that his injuries were life threatening, thereby supporting the trial court’s 25-point score.

The trial court scored 50 points for OV 6, determining that defendant acted with a premeditated intent to kill. MCL 777.36(1)(a). A sentencing judge is to score this variable “consistent with a jury verdict unless the judge has information that was not presented to the jury.” MCL 77.36(2)(a). In this case, the jury found that defendant acted with the specific intent to kill. Thus, the trial court’s 50-point score was consistent with the jury’s verdict. Defendant appears to rely on former MCL 777.22(1), which stated that OV 6 should only be scored in cases of “homicide or attempted homicide.” However, MCL 777.22(1) was amended by 2000 PA 279 and now instructs the court to “[s]core offense variables 5 and 6 for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or *assault with intent to commit murder*.” (Emphasis added.) Therefore, the trial court did not err in scoring OV 6 in the present case.

“Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services.” MCL 777.49. The court is instructed to score 15 points if “[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services.” MCL 777.49(b). Interfering or attempting to interfere with the administration of justice includes acts that constitute obstruction of justice, but is not limited to such acts. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Thus, a defendant can be assessed points under OV 19 for threatening a victim to dissuade him from reporting or prosecuting a crime. *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006).

In this case, the evidence showed that defendant shot the victim two days after the victim refused to speak with defendant at the courthouse before his preliminary examination in the prior assault case, following which defendant was bound over for trial in that case. The evidence supported an inference that defendant shot the victim because of the victim’s involvement in prosecuting defendant in the prior assault case. This was sufficient to support the trial court’s 15-point score for OV 19.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering