STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2008
v	No. 277854 Genesee Circuit Court
ANTHONY DEVARO JONES, Defendant-Appellant.	LC No. 06-018140-FC

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions for second-degree murder, MCL 750.317, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 30 to 75 years in prison for the second-degree murder conviction, 16 to 48 months in prison for the felonious assault conviction, and two years in prison for the felony-firearm conviction. We affirm.

I. FACTS

On February 7, 2006, James Earl Clark, Jr., was at home with his two-year-old son, and his best friend, Eric Woodward. Woodward testified that he commuted from his home in Lansing to visit Clark, but he left Clark's house to visit his mother. Woodward testified that upon his return, he saw defendant with another person pointing a gun at him demanding that he freeze. Woodward turned and ran out of Clark's house. He heard gunshots as he ran away. Woodward stopped and banged on the door of the house next to Clark's house. Woodward knew that Rhoda Clark, Clark's mother, lived in the house. He then ran down the street.

Rhoda Clark testified that she heard banging on her door, looked out the window, and saw someone running down the street. She opened the door and found her son shot and bleeding. Rhoda asked who shot him, and he replied, "Tracie[']s boyfriend shot me." When police arrived, Clark told one officer that "his baby's mother's boyfriend" shot him. Clark died at the hospital. A police officer found $1,731.51 on his body. Also, police found two bags of marijuana in Clark's house.

At trial, Tracie Hughes testified that she lived with defendant and had an ongoing sexual relationship with both Clark and defendant. Her and Clark had a two-year-old son. On February 7, 2006, Hughes and defendant dropped her son off at Clark's house. But Clark complained that

she did not bring enough food and clothing for the child, so she and defendant left and returned with more items. Tracie testified that she saw Woodward at Clark's house. After they left, defendant and Hughes went to pick up someone named Q-Ball. Defendant and Q-Ball drove away in another car. Hughes went to her aunt's house.

Hughes further testified that she told defendant about Clark's marijuana use, and she received marijuana from Clark to deliver to defendant. The prosecutor then asked,"Do you know where [defendant] gets . . . money?" Hughes replied, "He sells weed . . . ."

Defendant testified in his own defense. On direct examination, counsel asked, "On a prior occasion . . . you pled guilty to a case where you had broken in to steal something in a house. Is that right?" Defendant simply replied, "Yes." On cross-examination, defendant testified that he attempted to purchase marijuana from Clark on the day he died. But Clark refused the transaction.

The jury convicted defendant of second-degree murder, felonious assault, and felony firearm. Defendant now appeals.

II. HEARSAY

Defendant argues that the prosecutor elicited hearsay testimony that denied him his right to a fair trial and right of confrontation. We disagree.

A. Standard of Review

This unpreserved issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003).

B. Analysis

At trial, Officer Candace Miles testified that Jerome Tucker, who lived down the street from Clark, told her that he heard six gunshots at approximately 8:05 p.m. She interviewed him at about 8:30 p.m. Defendant argues first that Miles's testimony regarding Tucker's statement was impermissible hearsay.

Hearsay is a statement "offered by someone other than the declarant to prove the truth of the matter asserted." *People v McGhee*, 268 Mich App 600, 639; 709 NW2d 595 (2005). The prosecutor asserts that the statement was not offered to prove its truth because it merely helped to explain Miles's actions with respect to the investigation. There is no part of Miles's testimony, however, that is explained by Tucker's statement. The only apparent purpose of the statement was to corroborate the testimony of other prosecution witnesses regarding the time and location of the gunshots. The prosecutor has not offered any hearsay exception under which this testimony could have been admitted. *People v Stamper*, 480 Mich 1, 3-4; 742 NW2d 607 (2007) (explaining that hearsay is not admissible unless it falls within an enumerated exception). Thus, Miles's testimony in this regard was inadmissible hearsay.

But defendant did not preserve this issue; therefore, our review is limited to plain error affecting substantial rights. *Ackerman*, *supra* at 446. Reversal is required only when "plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* In this case, Tucker's statement regarding the time was corroborative and cumulative; it did not establish a determinative fact in the case in and of itself. Further, defendant's defense did not hinge on the timing of the gunshots. There is no evidence to indicate that this minor piece of evidence had any effect on the outcome of defendant's trial. Thus, this error does not require reversal.

Defendant next argues that the admission of Tucker's hearsay statement violated his constitutional right of confrontation. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker* (*On Remand*), 273 Mich App 56, 60-61; 728 NW2d 902 (2006). With regard to whether a statement is testimonial, this Court has distinguished between statements made "'to describe current circumstances requiring police assistance'" and statements made for the purpose of "'establishing the facts of a past crime.'" *Id.* at 63, quoting *Davis v Washington*, 547 US 813, 827; 126 S Ct 2266; 165 l Ed 2d 224 (2006).

Miles talked to Tucker approximately 25 minutes after Tucker heard the gunshots. No suspects had been apprehended at that time. Tucker's statements were clearly for purposes of establishing the status of the current situation rather than *solely* directed at establishing facts for later criminal prosecution. *Walker*, *supra* at 61-62. Tucker's statement was therefore nontestimonial.

III. MRE 404(b)

Next, defendant argues that the prosecutor improperly introduced evidence that defendant was unemployed and used and sold marijuana. We disagree.

A. Standard of Review

We review this unpreserved evidentiary issue for plain error. *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005).

B. Analysis

Evidence of "other crimes, wrongs, or acts" is inadmissible unless it is logically relevant under MRE 402, legally relevant under MRE 404(b), and its probative value is not substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 61-64; 508 NW2d 114 (1993). MRE 402 requires that evidence be relevant to an issue or fact of consequence at trial. *VanderVliet*, *supra* at 74. MRE 404(b) requires that evidence be relevant to some issue other than to show a propensity to conform to certain conduct. *Id.* Finally, even if the evidence satisfies these relevance requirements, "a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts . . . ." *Id.* at 75, quoting 28 USCA, p 196, advisory committee notes to FRE 404(b) (alteration by *VanderVliet* Court); see also MRE 403.

The prosecutor questioned Hughes regarding Clark's use and supply of marijuana. She further questioned Hughes regarding defendant's knowledge of Clark's marijuana and defendant's source of income. Hughes testified that defendant knew that Clark smoked a lot of marijuana and sometimes supplied Hughes with marijuana. She also testified that defendant was unemployed and sold marijuana to make money. Defendant, himself, testified that he tried to buy marijuana from Clark earlier on the day of Clark's death. This line of questioning was clearly designed to establish a possible explanation for a confrontation between defendant and Clark. This is relevant and permissible under MRE 404(b)(1). There is no evidence on the record that this line of questioning was designed to paint defendant as a drug-dealing societal outcast, as defendant suggests. Further, there is no reason to conclude that the jury would convict such a person of second-degree murder if the evidence did not support the conviction. Thus, the probative value of this testimony was not *substantially* outweighed by the possibility of undue prejudice.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his trial counsel was ineffective for eliciting evidence of his prior criminal record and for not objecting to the introduction of improper hearsay and MRE 404(b) testimony. We disagree.

A. Standard of Review

Defendant did not request a new trial or an evidentiary hearing; therefore, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

B. Analysis

Generally, counsel is presumed effective and the defendant must show that: (1) counsel's performance fell below an objectively reasonable standard, and (2) that defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Further, the defendant must demonstrate that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to demonstrate that an attorney's performance was substandard, a defendant must also overcome a strong presumption that the attorney's trial strategy was sound, even if the strategy is ultimately unsuccessful. *Id*. at 715. An appellate court will not substitute its judgment for that of defense counsel on questions of trial strategy. *Id.*

Defendant argues that defense counsel introduced evidence beneficial to the prosecutor's case that was not otherwise admissible when counsel asked him about his prior conviction involving breaking into a house and stealing property. He argues that the jury could have improperly concluded that he committed the instant crime because he has a propensity for breaking into houses. Contrary to defendant's contention, the instant crime does not appear to

have had any common components with his prior crime. No evidence was presented that defendant broke into Clark's house, rather than being invited in. Clark was found with $1,713.51 in cash on his person when he died and there was no evidence that anything from Clark's house was missing. Further, the prosecutor provided ample evidence of a motive concerning jealousy in the relationships among defendant, Clark, and Tracie Hughes. Hughes testified that she regularly had sex with both Clark and defendant during the months before the murder. Further, another witness testified that Hughes had told her that defendant wanted to kill Clark because of the ongoing relationship between Hughes and Clark. There is almost no similarity, on the record, between the conviction introduced by defense counsel and the instant offense.

This issue was not preserved and the prosecutor never attempted to impeach defendant with this information; therefore, there is no record to support defendant's contentions that this evidence would have been inadmissible if introduced by the prosecutor. Further, it must be presumed that defense counsel was engaging in sound trial strategy. *Rodgers*, *supra* at 715. Defendant has not demonstrated that defense counsel's attempt to preempt a possible line of impeachment by the prosecutor was not sound trial strategy.

Defendant also argues that defense counsel was ineffective for failing to object to the introduction of the hearsay and MRE 404(b) testimony discussed *supra*. However, because we have concluded that any error in the introduction of Miles's testimony was harmless and that there was no error in introducing the MRE 404(b) evidence, defendant's trial counsel was not ineffective for failing to object in either instance. *Mack*, *supra* at 130.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald