STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2010
v	No. 292072 Ottawa Circuit Court
DARICK OBRIEN ANDERSON, Defendant-Appellant.	LC No. 08-032883-FC

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree murder, MCL 750.316(1), two counts of first-degree felony murder, MCL 750.316(1)(b), and one count of armed robbery, MCL 750.529. He was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment for two counts of first-degree murder and 450 to 675 months in prison for the armed robbery conviction, all sentences to be served concurrently.[1] Defendant now appeals as of right. We affirm.

Defendant's convictions arise from the shooting deaths of Robert Karell and Louis Paparella during a robbery at R. K. Jewelers in Grand Haven on July 2, 2008. Also charged in the offense was defendant's brother, Dmitri Anderson. The two brothers were tried separately, with Dmitri being tried first.[2] Defendant was connected to the crime by both direct and circumstantial evidence. Witness testimony established that defendant was away from his home during the timeframe in which the offense was committed. Defendant's fingerprint was found on a cigar box that Karell kept in a safe and used to store money. Items from the jewelry store were also discovered during a subsequent search of defendant's residence. In addition, a stack of $100 bills was stolen during the robbery and the police found an envelope containing $5,000 in $100

[1] Because defendant's murder convictions arose from the deaths of only two individuals, two of the convictions were effectively vacated and defendant was sentenced on only two counts of first-degree murder.

[2] Dmitri Anderson was also convicted by a jury of two counts of first-degree murder, two counts of felony murder, and armed robbery. Codefendant Dmitri Anderson's appeal in Docket No. 291962 has been submitted for a decision along with this appeal.

bills in the garage of defendant's residence, and DNA matching defendant's DNA was found on the envelope. Defendant, who was unemployed, also purchased two mopeds for $1,850 on the day after the offense, using $100 bills to pay for them. A firearm that was linked to the offense through ballistics testing was discovered buried in the ground at the house of defendant's relative. That weapon had been stolen from another house a few days before the jewelry store robbery and evidence was presented connecting defendant to that earlier break-in. At trial, defendant admitted that he buried the murder weapon after the offense. Defendant also admitted being present during the offense, but denied shooting the victims or knowing that a robbery was going to be committed. He refused to identify who committed the crime and shot the victims.

I. CHANGE OF VENUE

Defense counsel filed a motion for a change of venue before trial. With the agreement of defense counsel, the trial court adjourned consideration of the motion and indicated that defendant could renew the motion at trial. Defendant did not renew the motion at trial and, after a jury was selected, defense counsel stated that he was satisfied with the jury. Defendant now argues that prejudicial pretrial publicity prevented him from receiving a fair trial and that defense counsel was ineffective for failing to renew the motion for a change of venue.

Because defendant did not raise this ineffective assistance of counsel claim before the trial court, our review of this issue is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below objective standards of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Generally, criminal defendants must be tried in the county where the crime was committed. However, the trial court may change venue to another county in special circumstances where justice demands. *People v Unger*, 278 Mich App 210, 254; 749 NW2d 272 (2008), citing *People v Jendrzejewski*, 455 Mich 495, 499-500; 566 NW2d 530 (1997). As this Court explained in *Unger*, 278 Mich App at 254:

> "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v Dowd*, 366 US 717, 722; 81 S Ct 1639; 6 L Ed 2d 751 (1961). Therefore, it may be appropriate to change the venue of a criminal trial when widespread media coverage and community interest have led to actual prejudice against the defendant. "Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Jendrzejewski, supra* at 500-501. Changes of venue might be required in cases involving "extensive egregious media reporting," "a barrage of inflammatory publicity leading to a 'pattern of deep and bitter prejudice' against the defendant," and "a carnival-like atmosphere surrounding the proceedings." *Id.* at 506-507 (citations omitted). Changes of venue might

also be required in cases involving "highly inflammatory attention to sensational details . . . ." *Id.* at 508.

Defendant acknowledges that the jurors who served on his jury all stated that they had not formed a firm opinion regarding defendant's guilt and could disregard any previous knowledge they had about the case. Nonetheless, defendant asserts that the inflammatory nature and breadth of the pretrial publicity in the case created a strong community feeling of prejudice toward him sufficient to overcome the presumption of juror impartiality, resulting in a presumption of prejudice. We disagree. The submitted evidence of the pretrial publicity that this case received and the record of the jury voir dire does not support defendant's assertion. The record discloses that the pretrial publicity was mostly factual and non-inflammatory, which is insufficient to require a change of venue. *Unger*, 278 Mich App at 255. The evidence does not reveal a community inundated with adverse publicity or demonstrate that the publicity that was generated resulted in actual prejudice against defendant. This conclusion is borne out by the jurors' responses during voir dire.

"'When a juror, although having formed an opinion from media coverage, swears that he is without prejudice and can try the case impartially according to the evidence, and the trial court is satisfied that the juror will do so, the juror is competent to try the case.'" *People v Cline*, 276 Mich App 634, 639; 741 NW2d 563 (2007) (citation omitted). Because the record does not reveal a pattern of strong community feeling against defendant and the seated jurors indicated that they could disregard any previous knowledge about the case and decide the case fairly and impartially on the basis of the evidence presented at trial, a change of venue was not warranted. Therefore, defense counsel was not ineffective for failing to renew his motion. *Unger*, 278 Mich App at 255.

We also reject defendant's argument that defense counsel was ineffective for failing to object to the trial court's voir dire procedure. Contrary to what defendant argues, *People v Tyburski*, 445 Mich 606; 518 NW2d 441 (1994), does not require that a trial court individually question potential jurors to ensure their impartiality. As explained in *Tyburski*, "[i]ndividual sequestered voir dire [is] not necessarily required, as long as the method of questioning [is] adequate to expose bias and to avoid taint." *Id.* at 626 (citation omitted). Here, the record reveals that the trial court conducted voir dire with the participation of the parties' attorneys, who also were permitted to individually question the veniremen, and that defense counsel challenged and excused several jurors based upon their responses. Both attorneys questioned the potential jurors regarding numerous facets of potential bias, including the media coverage. The trial court had no duty to do so itself. Because defendant has not demonstrated that the voir dire procedure was improper, there is no basis for concluding that defense counsel was ineffective for failing to object.

II. DEFENDANT'S TESTIMONY

Defendant raises several issues related to his testimony on direct examination by defense counsel, during which defendant erupted in a tirade and accused defense counsel of lying and working with the prosecutor. Defendant argues that it became apparent at that point that there had been a total breakdown of the attorney-client relationship and, therefore, the trial court should have either ordered a continuance and appointed new counsel, granted a mistrial, held a competency hearing, or taken other appropriate action to prevent or minimize the prejudicial

effect of defendant's outburst. Because defendant did not raise any of these claims in the trial court, they are not preserved. This Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is not warranted unless defendant is "actually innocent or . . . the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

The trial court did not have a duty to sua sponte order a continuance to replace appointed counsel. See *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000). Moreover, a mid-trial substitution would have unduly disrupted the judicial process. Thus, defendant was not entitled to substitute counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Defendant also argues that the trial court erred by failing to adequately control the trial. It is the duty of the judge to control all proceedings during a trial. MCL 768.29; *People v Anstey*, 476 Mich 436, 452; 719 NW2d 579 (2006). In doing so, the court is given broad discretion. *People v Collier*, 168 Mich App 687, 698, 425 NW2d 118 (1988). Defendant asserts that the trial court should have declared a mistrial because of his rant against the prosecutor and his counsel during his testimony. However, where a defendant perpetrates chaos at his own trial, he cannot then obtain a mistrial on the basis of prejudice. *People v Staffney*, 187 Mich App 660, 667; 468 NW2d 238 (1990). Defendant also asserts that the trial court should have called a recess and explained to him the consequences of his actions. However, defendant cites no authority in support of his position that the trial court had a duty to warn him of the ill effects of his testimony. Thus, he has not established a plain error.

Defendant further asserts that the trial court should have ordered an adjournment to hold a competency hearing. "[A] defendant is presumed competent to stand trial unless his mental condition prevents him from understanding the nature and object of the proceedings against him or the court determines he is unable to assist in his defense." *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). Where a defendant does not raise the issue, "the trial court ha[s] no duty to sua sponte order a competency hearing," *People v Inman*, 54 Mich App 5, 12; 220 NW2d 165 (1974), unless facts are brought to the trial court's "attention which raise a 'bona fide doubt' as to the defendant's competence." *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990).

Here, defendant's statements during his testimony were insufficient to create a "bona fide doubt" regarding his competency. Defendant's statements reflected anger and a belief that no one was advocating for him, not that he was incapable of assisting in his own defense. The statements demonstrated that defendant understood the charges against him, their seriousness, and that a conviction would mean life in prison. Therefore, the trial court did not plainly err in failing to sua sponte order a competency hearing.

Defendant also argues that he was constructively denied counsel when, in his opinion, defense counsel ceased to act as his advocate after defendant accused counsel during his testimony of working with the prosecutor. However, a constructive denial of counsel occurs when counsel provides no assistance to the defendant, entirely failing to challenge the

prosecutor's case in a meaningful way.[3] *People v Mitchell*, 454 Mich 145, 154; 560 NW2d 600 (1997). Here, the record does not support defendant's claim that he was denied any meaningful assistance, nor does defendant allege a denial of meaningful assistance. Although defendant frames his claim as one of a constructive denial of counsel, he actually asserts that defense counsel's performance at the end of trial was so deficient that it constituted a functional denial of counsel, which is analyzed under the standard for actual ineffective assistance of counsel claims as stated in *Frazier*, 478 Mich at 243. Defendant argues that defense counsel was ineffective when, after defendant began his rant on the witness stand, defense counsel did not immediately request a recess. The record indicates that defense counsel did try to stop defendant from speaking, but defendant spoke over him. Eventually, defense counsel advised defendant to not testify further and requested a recess. While it may have been prudent for counsel to have requested a recess sooner, defendant's rants were liberally interspersed with protestations and explanations of his and codefendant Dmitri Anderson's innocence. Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Under the circumstances, defense counsel's handling of defendant's tirade was not objectively unreasonable. Further, as previously indicated, there was no basis for a competency hearing or for substitute counsel because of defendant's tirade. Thus, defense counsel was not ineffective for failing to make those requests. *Unger*, 278 Mich App at 255.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's allegedly improper cross-examination of defendant. Defendant complains that the prosecutor was allowed to badger him, force him to comment on the credibility of other witnesses and his attorney, and improperly elicited sympathy for the victims' families. Although the record reveals that the prosecutor's cross-examination of defendant became heated at times, that was mostly due to defendant's failure to directly answer the prosecutor's questions.

Further, we find nothing in the record to support defendant's argument that the prosecutor asked him to comment on defense counsel's credibility. We agree that it was improper for the prosecutor to ask defendant whether a police officer was lying, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), and that some of the prosecutor's questions could be viewed as an improper attempt to elicit sympathy for victims' families. *Unger*, 278 Mich App at 237. However, even if defense counsel performed deficiently by failing to object to these questions, defendant was not prejudiced. Considering the overwhelming evidence of defendant's guilt, and the trial court's instructions advising the jury that it was solely responsible for determining witness credibility, and that it was not to allow sympathy to affect its decision, there is no reasonable probability that, but for counsel's failure to object, the result of the proceedings would have been different. Accordingly, defendant has not established a claim for ineffective assistance of counsel.

[3] A constructive denial of counsel can also occur when the state interferes with counsel's ability to provide effective assistance. *Id*. Defendant does not allege that this occurred in this case.

III. JURY INSTRUCTIONS

Defendant argues that the trial court erred by denying his request for a jury instruction on the defense of duress. This Court reviews for an abuse of discretion a trial court's decision whether a jury instruction is applicable to the facts of the case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Generally, a defendant is entitled to a jury instruction that is supported by the evidence. *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006). However, duress is not a valid defense to homicide. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). Defendant does not dispute that a duress defense is not applicable to a charge of first-degree premeditated murder, but contends that duress is a defense to first-degree felony murder. We disagree. A felony-murder conviction requires the jury to find that a murder occurred and that the defendant acted with malice sufficient to establish second-degree murder. *People v Aaron*, 409 Mich 672, 719, 727-730; 299 NW2d 304 (1980). Because duress is not a defense to second-degree murder, it cannot be a defense to felony murder.[4] Therefore, duress was potentially available as a defense only to the armed robbery charge.

Duress is an affirmative defense that "is applicable in situations where the crime committed avoids a greater harm." *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). Before a defendant is entitled to a jury instruction on the defense, he must produce some evidence of each of the following elements: (1) the threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant, (3) the fear or duress was operating on the mind of the defendant at the time of the alleged act, and (4) the defendant committed the act to avoid the threatened harm. *Id*. at 247-248. A defendant has a right to raise inconsistent defenses, but only if each is supported by evidence. *Id*. at 245 n 14.

We disagree with defendant's claim that the letter that he allegedly wrote in jail, which the prosecutor introduced into evidence at trial, was sufficient to support an instruction on duress. A defendant cannot rely on evidence to establish an element of a defense if he directly contradicts it during his own testimony. *Id*. at 250-251. Here, defendant disavowed writing the letter and testified that he did not rob anyone, thus "negating any claim that acts were justified by [his] actual fear." *Id*. at 251. Moreover, the letter contained no outright admission that defendant actually committed a criminal act. Thus, standing alone, the letter was insufficient to support the requested instruction. Accordingly, the trial court did not abuse its discretion in denying defendant's request for an instruction on the defense of duress.

III. PRIOR BAD ACTS

Defendant next argues that the trial court erred in admitting evidence of two home invasions, neither of which were the subject of charges in this case. We review the trial court's

[4] Defendant's reliance on *People v Merhige*, 212 Mich 601; 180 NW 418 (1920), to argue otherwise is misplaced because the defendant in that case was not charged with a homicide offense.

decision to allow the evidence for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). A trial court abuses its discretion when it chooses an outcome that is outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

MRE 404(b)(1) prohibits evidence of a defendant's prior bad acts to prove the character of a person to show action in conformity therewith, but allows such evidence for other permissible, noncharacter purposes. To be admissible under MRE 404(b)(1), the evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *Knox*, 469 Mich at 509. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Evidence is relevant if it could make a material fact in issue more probable or less probable than it would be without the evidence. *Knox*, 469 Mich at 509. Proffered evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury, *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010), or it would be inequitable to allow use of the evidence, *Waclawski*, 286 Mich App at 672. The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony. *Id.* at 670.

Before trial, the trial court ruled that the prosecutor could present evidence regarding property, including a handgun, that was stolen from the home of Dan Anderson on June 30, 2008. We agree that the evidence was relevant for the noncharacter purpose of linking defendant to the gun that was identified as the weapon that fired the two shell casings that were found at the crime scene. The gun had been stolen from Dan Anderson's house two days before the jewelry store robbery. Other property stolen from Anderson's home was recovered from defendant's residence. This evidence was relevant to establish defendant's access to the murder weapon. The collective evidence supported an inference that defendant stole the gun from Anderson's home and used it to commit the crimes charged in this case. Further, because access to the murder weapon was a significant issue in the case, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Therefore, the trial court did not abuse its discretion in allowing the evidence.

We also disagree with defendant's argument that the trial court abused its discretion in allowing evidence of a similar home invasion at the residence of Douglas and Laura Fessenden. The evidence was relevant to rebut defendant's implication that codefendant Dmitri Anderson was responsible for the Anderson home invasion. Again, it was important to link defendant to the Anderson home invasion to establish defendant's access to the murder weapon. The evidence showed that the Anderson and Fessenden home invasions were committed within hours of each other and both houses were ransacked in a similar manner. Further, a portion of the Fessendens' stolen jewelry was recovered from defendant's house. Therefore, the evidence supported a logical inference that the same person committed both home invasions, and that defendant was that person. And once again, because of the importance of the evidence to establishing defendant's connection to the murder weapon, which was a significant issue in the case, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Moreover, the trial court gave a cautionary instruction advising the jury on the

limited permissible use of the evidence, thereby minimizing the potential for unfair prejudice. Accordingly, the trial court did not abuse its discretion in allowing the evidence of the Fessenden home invasion.

IV. RIGHT OF CONFRONTATION

Defendant next argues that his right of confrontation was violated when a laboratory analyst, Kate Dozeman, was permitted to testify that DNA found on a rag in the Fessendens' garage matched defendant's DNA. Dozeman did not perform the DNA testing of the rag herself, but rather relied on the report of another analyst, who was not available for trial. Because defendant did not object to Dozeman's testimony at trial, this issue is unpreserved. Therefore, appellate relief is not warranted unless defendant demonstrates a plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

"The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination." *Payne*, 285 Mich App at 197, citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Statements are testimonial when they are made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use in a later trial or criminal prosecution. *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005), citing *Crawford*, 541 US at 51-52.

We agree that the admission of Dozeman's testimony was plain error because it was based on a non-testifying analyst's laboratory report, which was prepared in anticipation of criminal prosecution and, therefore, was testimonial hearsay. *Diaz v Massachusetts*, 557 US ___; 129 S Ct 2527, 2532; 174 L Ed 2d 314 (2009); *Payne*, 285 Mich App at 198-199. Although the non-testifying analyst was unavailable for trial, defendant had no prior opportunity to cross-examine her. Further, it is immaterial that Dozeman was also a DNA analyst. What matters is that she did not examine the evidence, conduct the testing, or personally reach the scientific conclusions. *Payne*, 285 Mich App at 198. Therefore, Dozeman's testimony in reliance on the non-testifying analyst's report was plain error because it violated defendant's right of confrontation.

However, this plain error did not affect defendant's substantial rights. The testimony did not directly relate to the charged offense. The only significance of the testimony was that it aided in establishing a connection between defendant and the Fessenden home invasion. However, that connection was established by independent evidence. Numerous pieces of jewelry that were identified as having been stolen from the Fessendens' house were recovered from defendant's house. Further, the relevancy of the Fessenden home invasion was that it established defendant's connection to the Anderson home invasion, which in turn established defendant's connection to the murder weapon. However, defendant later admitted during his testimony that he was present in the jewelry store when the charged offenses were committed, and he also admitted that he hid the murder weapon after the offense. Under the circumstances, there is no basis for concluding that the erroneous admission of the evidence that defendant's DNA was found on a rag in the Fessendens' garage affected the outcome of the trial. Because the plain error did not affect defendant's substantial rights, reversal is not required. *Carines*, 460 Mich at 763.

V. ADMISSIBILITY OF TESTIMONY

Defendant argues that testimony by Herkie Jewell and Augustus Butts was erroneously admitted at trial. Although defendant objected to Jewell's testimony regarding a personal protection order ("PPO") on relevancy grounds, he did not argue that the testimony should be excluded because it was unduly prejudicial. Accordingly, defendant's appellate challenge on this latter ground is not preserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (an objection on one ground is insufficient to preserve an appellate attack on a different ground). Further, defendant did not object to the testimony of either Jewell or Butts regarding defendant's statements that were indicative of criminal knowledge, leaving both of those claims unpreserved. Accordingly, our review of these issues is limited to plain error affecting defendant's substantial rights. *Knox*, 469 Mich at 508; *Carines*, 460 Mich at 763.

A. PERSONAL PROTECTION ORDER

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Feezel*, 486 Mich at 198. Evidence is unfairly prejudicial when there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Id.* At trial, Jewell testified regarding an encounter with defendant and codefendant Dmitri Anderson approximately two weeks before the charged offenses were committed. Jewell testified that he agreed to give defendant a ride to city hall so that defendant could take care of a matter involving a PPO. Although we agree that the reference to the PPO had little probative value, it also had little prejudicial effect. The reference was brief, it was intended merely to explain Jewell's recollection of the purpose for the trip, there was no mention of the circumstances involving the PPO, and the evidence was not used to argue that defendant was guilty of the charged offenses. Accordingly, even if the probative value of the testimony was low, it was not substantially outweighed by the danger of unfair prejudice. Accordingly, there was no plain error.

B. DEFENDANT'S STATEMENTS

Defendant also challenges the admissibility of statements that he made before the offenses were committed. According to Jewell, one to two weeks before the robbery, in response to Jewell's joking question about whether defendant intended to rob Karell's jewelry store, defendant stated, "If I'm going to hit a lick, I know how to do it." Jewell also testified that a remark was made about how defendant would get away with it, to which defendant replied, "If I did something like that, I know how to lay them down," which Jewell understood as meaning that defendant would do something to prevent any witnesses from telling. Butts testified that while he and defendant were talking about how to commit crimes, defendant stated that if a person opened a safe, he would "let them have it," i.e., "kill them," as soon as the safe was opened.

Although defendant argues that the statements were inadmissible under MRE 404(b)(1), that rule applies to evidence of other crimes, wrongs, or acts, not to statements of intent. *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). Instead, "the appropriate analysis is whether the prior statement[s are] relevant, and if so whether [their] probative value outweighs [their] potential prejudicial effect." *Id.* Defendant's reliance on *Goddard* to argue that the statements were inadmissible is misplaced because that case is factually distinguishable. In

Goddard, there was a disconnect between the defendant's hypothetical statement, the victim's death, and their corresponding circumstances. *Id*. at 519-520. Here, defendant's statements to Jewell were made within a couple of weeks of the offenses and referred specifically to the jewelry store that was the subject of the offenses. Although Butts provided no timeframe for defendant's statement, it involved circumstances that potentially mirrored what occurred during the instant offenses. Accordingly, defendant's statements were probative of his level of forethought regarding the charged crimes and their admission was not plain error.

Further, because there was no plain error in the admission of the foregoing statements, defense counsel was not ineffective for failing to object to the statements at trial. *Unger*, 278 Mich App at 255.

VI. WARRANTLESS ARREST

In a supplemental brief, defendant argues that his warrantless arrest at his home violated his Fourth Amendment rights and, therefore, his subsequent police statements should have been suppressed as the fruit of his unlawful arrest. Because defendant did not challenge either the validity of his arrest or the admissibility of his police statements in the trial court, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Knox*, 469 Mich at 508; *Carines*, 460 Mich at 763.

A warrant is not required to make a felony arrest as long as the police officer possesses information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. MCL 764.15(c); *People v MacLeod*, 254 Mich App 222, 227-228; 656 NW2d 844 (2002). "In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). However, when an arrest occurs in the defendant's residence, the federal and state constitutions require that special protections be afforded in regard to privacy interests. See *People v Johnson*, 431 Mich 683, 691; 431 NW2d 825 (1988), citing *Payton v New York*, 445 US 573, 589; 100 S Ct 1371; 63 L Ed2d 639 (1980) (police may not physically enter a defendant's home for the purpose of arrest without a warrant or consent), and *People v Oliver*, 417 Mich 366, 378-379; 338 NW2d 167 (1983).

In this case, the police arrested defendant when they encountered him in his home during the execution of a search warrant, the validity of which defendant does not challenge. Although we acknowledge that a search warrant cannot provide the sole basis for a defendant's seizure, inasmuch as the probable cause determinations differ, *Johnson*, 431 Mich at 690-693, we nonetheless conclude that there was probable cause for defendant's arrest here. At the time defendant was arrested, the police were aware that a jewelry store had been robbed and that the owner and a customer were both killed. Further, the police had information that defendant's fingerprint was found on a cigar box in which the owner kept money and stored in a safe. This information provided the police with probable cause to believe that defendant committed the robbery at the jewelry store. Thus, there was no plain violation of defendant's Fourth Amendment rights and, accordingly, no basis for suppressing his subsequent police statements. Therefore, defense counsel also was not ineffective for failing to file a motion to suppress

defendant's statements. *Unger*, 278 Mich App at 255.

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro