

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE FRYER,

Defendant-Appellant.

UNPUBLISHED
September 25, 2012

No. 302152
Wayne Circuit Court
LC No. 09-024200-01-FC

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to commit murder,¹ felonious assault,² and possession of a firearm during the commission of a felony (felony-firearm).³ He was sentenced to serve concurrent prison terms of 15 to 60 years and 17 months to four years for the assault convictions and a consecutive two-year prison term for the felony-firearm conviction. We affirm.

I. PRIOR ACTS EVIDENCE

This issue involves the prosecution's desire to use testimony developed at defendant's prior trial. In the prior case, the prosecution alleged that, on June 28, 2009, in the area of Greenfield and West Chicago, defendant, riding in an automobile, pulled up to complainant Jeremy Burns' car and fired multiple shots, striking Burns in the shoulder, neck, and collarbone. Defendant was acquitted in that case.

In the instant case, the prosecution filed a notice of intent to use prior acts evidence at trial. The notice stated that the charges against defendant in the instant case arose on August 17, 2009, when complainants Erron Sanders and John Taylor pulled their car into a gas station at

¹ MCL 750.83.

² MCL 750.82.

³ MCL 750.227b.

Greenfield and West Chicago. Defendant pulled up in his car and fired multiple shots into complainants' car, striking Sanders, the driver, in the back of his right shoulder. The prosecution sought to admit Burns' testimony in this case to show defendant's intent, identity, scheme, plan, or system. The prosecution alleged that, in both the prior case and the instant case, defendant targeted his victims near the same intersection, while his victims were in their vehicles. According to the prosecution, in both the prior case and the instant case, defendant was in a vehicle that approached the victims' vehicles, and the victims were shot in their shoulder and neck area. Defendant argued that Burns' testimony should be excluded because, in the prior case, Burns' testimony was inconsistent with regard to identifying the shooter, and that the evidence did not show a design, plan, or scheme. Defendant also argued that the probative value of the testimony was far outweighed by its prejudicial effects because Burns was paralyzed and in a wheelchair, and the jury would sympathize with him. The trial court agreed with defendant and ruled that the testimony was so prejudicial that it would not allow it to be admitted into evidence.

The prosecution filed a motion in this Court for immediate consideration of the issue. This Court granted the motion and reversed the trial court's ruling. Specifically, this Court held that "[e]vidence of defendant's participation in a drive-by shooting at the same intersection within eight weeks of the instant drive-by shooting is more probative than prejudicial given that it relates to defendant's scheme or plan, which is central to the charges." This Court also indicated that the trial court had the discretion to adopt the prosecution's suggestion to read Burns' prior testimony into the record rather than have him testify in person.⁴

Prior to the start of defendant's trial, after this Court had issued its order permitting the use of Burns' testimony, Defendant requested that Burns' testimony be admitted into evidence through the transcript of the prior trial. The prosecution argued that Burns should be required to testify in person. The trial court ruled that Burns would testify in person. Following the trial, the jury was unable to reach a verdict, and the trial court declared a mistrial. Defendant was tried a second time, and Burns testified again. Defendant's trial counsel did not object to Burns' live testimony. This time, the jury convicted defendant on three of the charged counts.

Now, on appeal, defendant argues that he was denied his due process right to a fair trial because this Court simply substituted its judgment for the trial court when it held that Burns' testimony was admissible. Defendant argues that this Court is not bound by the "law of the case" in this appeal, and that this Court did not find that the trial court abused its discretion when it granted the prosecutor's motion for intermediate consideration and reversed the trial court's ruling. Defendant requests this Court reconsider the issue of the admissibility of Burns' testimony.

The law of the case doctrine provides that an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent

⁴ *People v Antoine Fryer*, unpublished order of the Court of Appeals, issued August 13, 2010 (Docket No. 299413).

proceedings in the same case.⁵ The law of the case doctrine “is an ill-defined and amorphous creature,” and “is not inflexible.” Indeed, “unlike in standard civil proceedings, in criminal cases the law of the case doctrine does not automatically doom the defendant’s arguments or automatically render them frivolous”⁶ As this Court has previously held, the doctrine “need not be applied to create an injustice or where a prior decision is clearly erroneous.”⁷ Accordingly, although generally the law of the case doctrine would resolve this issue, we will nonetheless review it to determine whether the prior decision of this Court was clearly erroneous.

The admissibility of prior acts evidence is governed by MRE 404(b)(1). As the Supreme Court has noted “[t]he general rule is more easily stated than applied: evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts.”⁸ Such evidence may be admissible for other purposes, however. MRE 404(b)(1) provides that:

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.

In *Crawford*, the Supreme Court noted that, “[u]nderlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged.”⁹ Accordingly, evidence of a defendant’s prior acts is only admissible if “(1) the evidence [is] offered for a proper purpose; (2) the evidence [is] relevant; and (3) the probative value of the evidence [is] not [] substantially outweighed by unfair prejudice [under MRE 403].”¹⁰

Regarding whether prior acts evidence is offered for a proper purpose, the Supreme Court has explained that “[e]vidence relevant to a noncharacter purpose is *admissible* under MRE 404(b)(1) *even if* it also reflects on a defendant’s character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant’s character or criminal propensity.”¹¹ In other

⁵ *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

⁶ *Herrera*, 204 Mich App at 340.

⁷ *People v Wells*, 103 Mich App 455, 462-463; 303 NW2d 226 (1981). See also *People v Phillips*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997) (same).

⁸ *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

⁹ *Crawford*, 458 Mich at 384.

¹⁰ *People v Kahley*, 277 Mich App 182, 184-85; 744 NW2d 194 (2007).

¹¹ *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010) (emphasis in original).

words, evidence that is incidentally probative of bad character is still offered for a proper purpose if it is also probative of one of the additional purposes outlined in MRE 404(b)(1). One such additional purpose is the evidence's tendency to show a defendant's "scheme, plan or system in doing an act."¹² In *People v Sabin*, the Supreme Court explained that prior act evidence is admissible as a 404(b)(1) proper purpose if it is sufficiently similar to the conduct giving rise to the charged offense. The Court explained that, alone, "general similarity" between prior and present acts will not establish a "scheme, plan or system." Rather, "the effort is to establish a definite prior design or system which included the doing of the act charged as part of its consummation."¹³

Here, we conclude that the facts described in Burns' testimony regarding the prior shooting were sufficiently similar to the facts of the instant case to show defendant's "scheme, plan, or system." Accordingly, Burns' testimony was not relevant "solely to [] defendant's character or criminal propensity"¹⁴ and was therefore admitted for a proper purpose under MRE 404(b)(1). In his testimony, Burns alleged he had been shot by defendant, who was travelling in a vehicle, near the same intersection as complainant Sanders in the instant case, who also alleged that defendant shot at him from a vehicle. Burns and Sanders both testified that they were in their automobiles and that defendant, who was also in an automobile, shot at them several times out of the passenger window of his car. Both Burns and Sanders were shot in areas of their bodies that were exposed while sitting in a car (the head, neck, and shoulder). The shootings occurred within approximately eight weeks of each other, the individuals who were shot were friends, and the complainants and defendant all knew each other from the neighborhood. At trial, defendant testified that he was involved in an altercation at a bar in which he had been shot, and that Sanders and Burns were involved. In short, Burns' shooting and Sanders' shooting were not merely "general[ly] similar[],"¹⁵ but were sufficiently similar to establish defendant's "scheme, plan, or system" within in the meaning of MRE 404(b)(1).

Moreover, the probative value of Burns' testimony was not substantially outweighed by unfair prejudice under MRE 403. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence."¹⁶ The trial court provided the jury with a limiting jury instruction before Burns testified, instructing the jury to consider the testimony only for whether it tended to show that defendant used a system or scheme that he had used before, and not for any other

¹² MRE 404(b)(1).

¹³ *People v Sabin*, 463 Mich 43, 64; 614 NW2d 888 (2000), quoting 2 Wigmore Evidence (Chadbourn rev.), § 304, p. 249.

¹⁴ *Mardlin*, 487 Mich at 615-616 (emphasis omitted).

¹⁵ *Sabin*, 463 Mich at 64.

¹⁶ *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (citations omitted).

purpose. Jurors are presumed to follow their instructions;¹⁷ accordingly, we cannot conclude that the jury gave “undue or preemptive weight” to Burns’ testimony.

In sum, the admission of Burns’ testimony in defendant’s second trial did not run afoul of MRE 404(b)’s prohibition of propensity evidence. We therefore cannot conclude that this Court’s prior order, which reversed the trial court and held that Burns’ testimony was admissible, was clearly erroneous. The law of the case doctrine applies to this appeal, and this Court’s prior order binds us.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that he was denied his due process rights to a fair trial because of inappropriate statements made by the prosecutor during closing arguments. We disagree.

Defendant did not object to the prosecutor’s comments at trial. Accordingly, this issue is unpreserved. This court reviews forfeited claims of prosecutorial misconduct for plain error that affected defendant’s substantial rights.¹⁸ “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.”¹⁹

“Given that a prosecutor’s role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.”²⁰ In determining whether a prosecutor’s statements during trial constitute misconduct, the remarks “must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.”²¹ The prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution’s theory of the case. “When a defendant advances a theory, the prosecutor may argue the inferences flowing from that theory.”²²

During its closing statement, the prosecutor made the following statement:

Now, you don’t have to take my word for it, the Defendant told you. I said it was wrong..was it wrong to shoot Erron? Yeah, it was wrong. The Defendant told you, he knows what he did was wrong; he knows it. And it was wrong what happened to Jeremy Burns also, and you can think about how Jeremy

¹⁷ *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

¹⁸ *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

¹⁹ *Id.* at 461.

²⁰ *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

²¹ *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

²² *Fyda*, 288 Mich App at 462.

Burns was rolled up on by the Defendant. Jeremy Burns was sitting in car [sic] just like Erron was at the same exact place when the Defendant did a sneak attack.

Rolled up, pulled out his gun, makes a conscious effort and a conscious choice to blast that person away. It was the same exact thing that happened in this case.

In rebuttal, the prosecutor made the following statement:

These people use the court system. You have to go back there and do the work. You gotta do the work in this case, because man is counting on it. That you are not going to understand their way of life, and how they live by the streets, and their code by the street, and that you're just gonna throw your hands up and say they're all thugs who cares. Defendant's counting on it. Don't fall into that trap. They are opportunist [sic] and they are cowards. They gun people down when they have a chance to do it. That's what happened to Jeremy Burns, and that's what happened to Erron Sanders.

Defendant contends that these statements go beyond the limitations for which Burns' testimony was admitted and are merely used to show that defendant is of bad character. This Court previously held held that Burns' testimony could be admitted to show defendant's scheme or plan, and, as discussed previously, that decision was not clearly erroneous. The prosecutor's statements are consistent with that purpose. Furthermore, the trial court gave the jury an instruction that the arguments of the attorneys are not evidence and are only meant to help the jury understand the evidence and the legal theories of each party.²³

Defendant argues that the prosecutor's statements regarding what "these people" do and that "[t]hey gun people down when they have a chance to do it" were intended to show his "assaultive nature." We disagree. Defendant ignores all of the evidence admitted at trial regarding the alleged altercations and shootings between the individuals involved and the lies to which each of them testified. Defendant also ignores the argument made by defense counsel that he grew up in the suburbs and, unlike defendant, did not know the fear of having been shot at three times by Sanders and the fear defendant experienced coming face to face with Sanders at the gas station that day. The evidence revealed that defendant had been shot by Sanders and spent a week in the hospital recovering, yet he apparently never filed a police report. Defense counsel argued in his closing argument that multiple witnesses had lied, but that his client was telling the truth regarding self-defense. In short, both the prosecutor and defense counsel in this case painted a picture of a way of life that was very different from the lives of law-abiding citizens. The prosecution admitted that none of the individuals in this case had clean hands but refocused the jury to the specific circumstances in the instant case: whether or not defendant was in fear and acted in self-defense or whether he intended to shoot Sanders.

²³ *Abraham*, 256 Mich App at 279 (jury instructions are presumed to cure most errors and jurors presumed to follow their instructions).

In sum, in light of the evidence presented in the case, defendant's argument that he acted in self-defense, and the statements made by both parties in their closing arguments, the statements made by the prosecutor do not rise to the level of misconduct. Defendant was not denied a fair and impartial trial by the prosecutor's comments.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next identifies three instances where he argues his trial counsel was deficient. First, defendant argues that his counsel failed to successfully limit Burns' testimony to the transcript of the preliminary examination. Second, defendant argues that defense counsel was ineffective by failing to object to the prosecutor's statements during its closing argument. Third, defendant argues that defense counsel was ineffective by failing to object to the improper jury instruction given by the trial court on the issue of prior acts. Defendant argues that each of these instances amounts to ineffective assistance of counsel. We disagree.

Whether a defendant's trial counsel was ineffective "is a mixed question of fact and constitutional law."²⁴ A trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo.²⁵ To establish a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different.²⁶ Effective assistance of counsel is presumed and the "defendant bears a heavy burden to prove otherwise."²⁷ Decisions to decline to object to procedures, evidence, or an argument may fall within sound trial strategy.²⁸ Defense counsel is afforded wide latitude on matters of trial strategy, and this Court abstains from reviewing such decisions with the benefit of hindsight.²⁹

Before the beginning of the first trial, defendant's counsel requested that Burns' testimony be limited to the transcript, and the trial court denied the motion. After the trial court declared a mistrial of the first trial because of a deadlocked jury, defendant was tried a second time. Any attempt to limit Burns' testimony to the transcript of the preliminary examination would have been futile because the trial court had already ruled on this issue in the first trial. Defense counsel was not ineffective for failing to make a futile objection.³⁰ Furthermore, defense counsel's failure to request that Burns' testimony be limited to the prior transcript fits

²⁴ *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

²⁵ *Id.*

²⁶ *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

²⁷ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

²⁸ *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008).

²⁹ *Id.* at 242-243.

³⁰ *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

within sound trial strategy. Limiting Burns' testimony in this regard would not have allowed defense counsel to question Burns on issues regarding defendant's position of self-defense in the instant case. We abstain from reviewing defense counsel's trial strategy with the benefit of hindsight.³¹

Defendant's second claim of ineffective assistance concerned defense counsel's failure to object to the prosecutor's statements during closing and rebuttal arguments. However, as discussed, these statements were not improper, and defense counsel was not ineffective by failing to raise futile objections to them.³²

Finally, defendant claims that the trial court committed error in instructing the jury regarding the use of prior acts evidence. Defendant raises this claim both as an issue of ineffective assistance of counsel for counsel's failure to object and an error of the trial court in instructing the jury that denied him the right to a fair trial.

Defendant moved this Court for a remand to correct alleged errors by the prosecutor, defense counsel, and the trial court. Defendant also moved for a new trial. This Court granted the motion in part, limited to the issue whether the trial court's instruction to the jury regarding the use of prior bad acts evidence was in error or whether the transcript merely contained an error in transcription by the court reporter. In response to this Court's order, the trial court held an evidentiary hearing. At the evidentiary hearing, defendant's attorney questioned the court reporter who testified that she takes the testimony down verbatim from a mask, and then it is recorded on a device. The court reporter played the recording. It revealed that the jury instruction regarding other improper acts was correctly read into the record at the time of the trial. The trial court had instructed the jury, in part, "You must not consider this evidence for any other purpose. For example, you must *not* decide that it shows that the defendant is a bad person"³³ In transcribing the court's words, the court reporter omitted the word "not." Finding that the instruction was correctly given to the jury, the trial court denied defendant's motion for a new trial. Therefore, the issues of whether the court erred, or whether counsel was ineffective for failing to object, are now moot because it has been resolved that there was no error. Further, the record is sufficient for this Court to determine that defendant received the effective assistance of counsel, and no further remand is necessary.

³¹ *Unger*, 278 Mich App at 242-243.

³² *Ericksen*, 288 Mich App at 201.

³³ Emphasis added.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Jane M. Beckering