

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CATHERINE GERTRUDE BENDER,

Defendant-Appellant.

UNPUBLISHED

March 22, 2012

No. 302792

Ottawa Circuit Court

LC No. 10-034936-FH

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Catherine Gertrude Bender, appeals as of right from her convictions for unlawful killing of an animal, MCL 750.50b; conspiracy to commit the unlawful killing of an animal, MCL 750.157a; larceny in a building, MCL 750.360; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to pay restitution for the unlawful killing of an animal, six months' incarceration for conspiracy to commit the unlawful killing of an animal, six months' incarceration for larceny in a building, and two years' imprisonment for felony-firearm. We affirm.

A. BASIC FACTS

This case stems from the killing of "Mildred" – a cow owned by Thomas and Geraldine Young. The Youngs lived only one mile from defendant's home. Defendant and Thomas's older brother, Tim, held themselves out as legally married. Tim was accused of molesting his niece¹ and absconded from the law. In the summer of 2009, defendant left home to join Tim out of state, leaving their 15-year-old daughter, Georgia, home alone. Thomas and Geraldine took Georgia into their home for the summer. It was during that time that Georgia told Thomas that Tim had also sexually abused her.² This prompted Thomas to seek help for Georgia. Defendant eventually returned home. Thomas tried to tell defendant about Georgia's claim of sexual assault, but defendant "disregarded it" and said it was a "lie." This disregard for Georgia's

¹ Not one of Thomas's children.

² At trial, Georgia admitted that she told Thomas that Tim had abused her, but that she was lying at the time.

claims led to a strain on the relationship between defendant and Thomas and Geraldine. Based on defendant's lack of concern, Geraldine told defendant she was no longer welcome at Geraldine's home.

The family discord increased when Thomas was subpoenaed to testify against Tim regarding the allegations of criminal sexual conduct. Thomas was scheduled to testify against Tim on approximately June 28, 2010. Sometime in December of 2009, defendant indicated to Thomas, with respect to his testimony against Tim, that she was "not sure" she would "allow that to happen." At the time of the shooting, there was also a dispute between Thomas and defendant regarding payment for certain farm equipment.

On the night of May 1, 2010, a party was held for Matthew Tarman at defendant's house. Tarman was friends with defendant's son, Dustin Bender. In addition to defendant, Tarman, and Dustin, a number of other individuals attended, including Christopher Idema, Patrick McClain, Jane Alice Linsea, and Erica Wilson. Most of the individuals at the party were drinking alcohol in significant quantities. Defendant was not drinking, nor was Georgia.

At approximately 8:00 p.m. or 9:00 p.m., Dustin or Tarman brought up the idea of possibly going out and "shooting something." Everyone seemed to believe this discussion was merely a joke. A few hours after the topic of shooting something was initially brought up, defendant pulled Dustin aside and spoke to him privately. Defendant indicated she was "sick of" Thomas "screwing the family over." At the time, defendant mentioned the dispute regarding the payment for farm equipment. Dustin testified that his impression was that defendant "wanted to get even." Defendant told Dustin, while she cried, that she wanted Dustin to shoot Thomas's cow because she was sick of Thomas "screwing the family over." Dustin agreed to kill the cow for defendant because he was intoxicated and wanted to make his mother happy.

Defendant went to her bedroom and retrieved a revolver and a shotgun. Dustin selected the revolver to use and McClain selected the shotgun. The revolver was loaded when defendant provided it to Dustin. All of the individuals present at the party except for Idema and Georgia got into Tarman's truck and drove to Thomas's property. When the vehicle stopped, Dustin, armed with a revolver, and McClain, armed with a shotgun, exited the vehicle. McClain watched Dustin drag Mildred out of the barn. Dustin shot Mildred between the eyes with the revolver. After the shooting, the group returned to defendant's house. Defendant and Dustin took the weapons and hid them. When Dustin woke up the next morning, defendant was cleaning the guns with a rag.

Within a few days, Dustin was arrested. After Dustin was bailed out of jail, defendant suggested they blame the shooting on Tarman. Dustin was subsequently arrested on a charge relating to witness intimidation, pertaining to allegedly intimidating Thomas not to testify against Tim in the criminal sexual conduct case. Dustin then decided to tell the police the truth.

Defendant initially denied any involvement in the shooting. After being told that her denial was inconsistent with other witnesses' statements, defendant then indicated she shot the cow because she was tired of Thomas "screwing her family over." Defendant changed her story a third time and indicated Dustin shot the cow. Defendant admitted she gave Dustin and McClain loaded guns and that she was in Tarman's truck when the shooting occurred.

Dustin pleaded guilty to certain charges in exchange for his testimony against defendant. Defendant did not testify at trial. Defendant called three witnesses to testify regarding the reputation for truthfulness of Thomas and Dustin. All three claimed Thomas and Dustin had, essentially, reputations for dishonesty.

The jury convicted defendant on all four counts and defendant was sentenced as outlined above. She now appeals as of right.

B. ANALYSIS

Defendant argues that she was denied a fair trial due to the admission of certain evidence that defendant contends violated MRE 404(b). We disagree. Defendant specifically challenges: (1) evidence relating to Tim's criminal sexual conduct charges relating to his niece and Georgia; (2) evidence relating to Tim absconding from bond on an unidentified charge; (3) evidence that defendant left with Tim when he absconded, leaving Georgia behind; and (4) evidence relating to defendant not believing Georgia with respect to the claim of criminal sexual conduct by Tim. We review defendant's unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To demonstrate plain error, a defendant must show: (1) an error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *Id.* at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* The burden is on defendant to demonstrate prejudice. *Id.*

"Evidence is generally admissible if it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice." *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). "Under MRE 404(b), the prosecution may not present evidence of a defendant's other crimes, wrongs, or acts in order to show a defendant's propensity to commit a crime." *Id.* "Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *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." *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010) (emphasis in the original).

With respect to the evidence that Tim had pending criminal sexual conduct charges against his niece, that he absconded from the law, and that he committed sexual misconduct with Georgia, we find that defendant has failed to implicate MRE 404(b). This evidence involved Tim's conduct and other acts, not defendant's conduct. MRE 404(b) does not apply to preclude the evidence because the evidence did not involve defendant's conduct and, therefore, was clearly not used to show defendant acted "in conformity therewith." MRE 404(b)(1); see also *People v Roper*, 286 Mich App 77, 92; 777 NW2d 483 (2009). Consequently, defendant did not demonstrate plain error.

We also find that the remaining challenged evidence – pertaining to defendant leaving Georgia behind when she left with Tim and that defendant did not believe Georgia regarding the alleged sexual abuse – did not implicate MRE 404(b). Defendant's conduct did not constitute evidence of "other crimes, wrongs, or acts" admitted "to prove the character" of defendant "in order to show action in conformity therewith" under MRE 404(b)(1). MRE 404(b) mandates the exclusion of evidence where it is used solely as evidence of "defendant's character" or to show

defendant's "propensity to act in conformance with" her character. *Mardlin*, 487 Mich at 615. The challenged evidence was actually admitted to explain the family discord between defendant and Thomas, not to impugn defendant's character or to show her propensity to commit the charged crimes. The evidence was relevant to defendant's motive in wanting Mildred killed. Evidence of motive is relevant and admissible, even if it also implicates MRE 404(b). *People v Yost*, 278 Mich App 341, 406; 749 NW2d 753 (2008). Additionally, the "probative value" of the evidence was not "substantially outweighed by the danger of unfair prejudice." MRE 403. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). We find nothing indicating the challenged evidence was "unfairly prejudicial." *Id.*

Additionally, at defense counsel's request, the trial court gave the following limiting instruction:

Members of the jury, you have heard evidence that was introduced to show that the defendant left for a certain period of time Georgia while the defendant left wherever Georgia was living. The defendant is not on trial for that. If you believe this evidence, you must be very careful only to consider it for certain purposes. That purpose would be that the defendant acted in her own self-interest as opposed to that of her own children.

You must not consider this evidence for any other purpose, such as that the defendant is a bad person or a bad parent, or that she is likely to commit any child neglect or abuse. You must not convict the defendant simply because you believe that the defendant is guilty of other bad conduct. All of the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find the defendant not guilty.

Therefore, any "other acts" evidence complained of was admissible because it was offered for a proper purpose, was relevant to a material fact at issue, the probative value is not substantially outweighed by a danger of unfair prejudice, and the trial court gave the jury a limiting instruction. See *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Defendant has failed to demonstrate plain error affecting her substantial rights.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly