

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 10, 2012

v

COREY JAMAL HARRIS,
Defendant-Appellant.

No. 304046
Wayne Circuit Court
LC No. 10-005881-FC

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and one count of carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b. He was sentenced to 3 to 10 years' imprisonment for each count of assault with intent to do great bodily harm less than murder, and to two years' imprisonment for felony-firearm. Defendant appeals as of right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE AND DEFENDANT'S MOTION FOR DIRECTED
VERDICT

Despite being acquitted on the assault with intent to murder charge, defendant argues that the trial court erred in denying his directed verdict motion on that charge and in instructing the jury on the charge. He also argues that the prosecution presented insufficient evidence of assault with intent to do great bodily harm less than murder, the offense for which he was convicted. We disagree.

We review the record de novo when reviewing a claim of insufficient evidence. *People v Meissner*, 294 Mich App 438, 452; ___ NW2d ___ (2011); *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010). We review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Similarly,

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could

persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. [*People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).]

A. ASSAULT WITH INTENT TO MURDER

Defendant argues that the “trial court erroneously allowed [the] charge [of assault with intent to murder] to go to the jury.” We disagree.

The elements of assault with intent to murder are: “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal citations omitted). Assault with intent to murder is a specific intent crime, meaning that “specific intent to kill must be present in order to sustain a conviction of assault with intent to murder.” *Id.* at 148. The specific intent to kill “may be inferred from any facts in evidence . . . [including] minimal circumstantial evidence.” *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008) (internal citations omitted). Among the factors that a jury may use to infer the specific intent to kill are:

[T]he nature of the defendant’s acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985) (internal citations omitted).]

Here, in the roughly 15 to 20 minutes prior to the shooting, defendant was entering the bar, and Tamia Reeves, a security guard, attempted to move him from the entrance he was blocking. In response, he told Reeves to “get your . . . hands off me.” This attracted the attention of Deshawn Hillery, the head of security, who, at the bar owner’s request, escorted defendant out of the bar. When he was being escorted out of the bar, defendant said “I’ll be back,” or, as Hillery recalled, “I’m going to come back, and I’m going to shoot this . . . up.” When he was told that, if he did return and shoot at the bar he would most likely be caught, defendant replied that he “didn’t give a” Defendant then got in a dark-colored car and drove away. Defendant’s “conduct and declarations prior to . . . the assault” and his “temper [and] disposition of mind” were therefore consistent with someone who intended to shortly return and shoot at people. See *Taylor*, 422 Mich at 568. Hillery’s employees later saw a dark-colored car, consistent with defendant’s vehicle, driving past the bar. About 15 to 20 minutes after he was escorted out of the club, defendant returned, parked his car, exited the vehicle with a rifle, and opened fire. Therefore, “the instrument and means used were naturally adapted to produce death,” as firearms are deadly weapons. See *Taylor*, 422 Mich at 568. Reeves saw fire coming from the barrel of defendant’s weapon. Avar Dawsey, another security guard, could clearly see defendant’s face. Construing the evidence in the light most favorable to the prosecution, there was sufficient circumstantial evidence from which a rational jury could infer defendant’s specific intent to kill. Accordingly, it was not error for the trial judge to deny defendant’s directed verdict and instruct the jury regarding assault with intent to murder.

Moreover, even assuming, arguendo, that the trial court erred when it instructed the jury on assault with intent to murder, defendant would not be entitled to relief. Defendant relies on *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), to support his argument that an “erroneous instruction on [a] higher charge require[s] reversal.” However, *Vail* was expressly overruled by *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998). As the Michigan Supreme Court held in *Graves*, “[w]here a jury acquits a defendant of an unwarranted charge . . . before convicting of a . . . lesser charge, we find that it is highly probable that the erroneous submission of the unwarranted charge did not affect the ultimate verdict.” *Id.* at 487. In other words, “a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to the jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury. Such a result squares with respect for juries.” *People v Moorer*, 246 Mich App 680, 683; 635 NW2d 47 (2001), quoting *Graves*, 458 Mich at 486-487. Here, defendant was convicted of the lesser-included offense of assault with intent to do great bodily harm less than murder and acquitted of the higher charge of assault with intent to murder. As will be discussed, he was convicted of the lesser-included charge, which was properly submitted to the jury. Accordingly, even if the higher charge was improperly submitted to the jury, which it was not, the error would have been harmless.

B. ASSAULT WITH INTENT TO DO GREAT BODILY HARM LESS THAN MURDER

Defendant next argues that the prosecution presented insufficient evidence to sustain his conviction of assault with intent to do great bodily harm less than murder. We disagree.

The elements of assault with intent to do great bodily harm less than murder are: “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *Brown*, 267 Mich App at 147 (internal citations omitted). Assault with intent to do great bodily harm less than murder is a specific intent crime. *Id.* “This Court has defined the intent to do great bodily harm as an intent to do serious injury of an aggravated nature.” *Id.* (internal citations omitted). “No actual physical injury is required for the elements of the crime to be established.” *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992).

In *Harrington*, the defendant shot at the victim from approximately 20 yards shortly after threatening the victim and screaming obscenities. *Id.* at 426. The defendant’s shots did not actually strike the victim. *Id.* Nonetheless, this Court held that the evidence was sufficient to support a conviction of assault with intent to do great bodily harm less than murder. *Id.* at 429-430. Similarly, here, defendant loudly threatened to shoot at the bar while being escorted from it. Shortly thereafter, a dark car, consistent with the one in which defendant drove away, returned. Defendant exited the car and began shooting at the bar from across the street. Dawsey could clearly see defendant’s face as he shot at the bar. Defendant used a long gun, a rifle, and subsequent forensics testimony indicated that the shells recovered from the scene were consistent with having been fired from a rifle. Moreover, defendant’s actions caused an actual injury here: James Watkins, a patron of the bar, was struck in the leg by one of the bullets. Accordingly, the prosecution presented sufficient evidence that defendant attempted with violence to do harm to others, and intended to do great bodily harm less than murder.

II. “OTHER ACTS” EVIDENCE

Defendant next argues that he was denied a fair trial when the prosecution introduced testimony that defendant had been in a violent altercation in the same bar where the shooting occurred around Thanksgiving, 2010, four weeks prior to the shooting. We disagree.

“To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal.” *Aldrich*, 246 Mich App at 113. Here, defendant did not object to the introduction of the evidence which he now argues was improperly before the jury. Therefore, this issue was not properly preserved for appellate review.

Because this issue is unpreserved, this Court reviews it for plain error affecting substantial rights, and will therefore reverse only if defendant is actually innocent, or if the error “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), and *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

So-called “other acts” evidence is governed by MRE 404(b)(1)(1). As the Supreme Court has noted, in a leading case on “other acts” evidence, “[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.” *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). 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.” *Crawford*, 458 Mich at 384.

Generally, “other acts” evidence is 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].” *People v Kahley*, 277 Mich App 182, 184-85; 744 NW2d 194 (2007). Regarding whether “other acts” evidence is offered for a proper purpose, the Supreme Court recently 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.” *People v Mardlin*, 487 Mich 609, 615-16; 790 NW2d 607 (2010) (emphasis in original). In other words, evidence that is incidentally probative of character

is still offered for a proper purpose if it is also probative of some other issue outlined in MRE 404(b)(1).

Hillery testified that, four weeks prior to the shooting, he “had to stop [defendant] from fighting another guy,” and that he had to remove defendant from the bar as a consequence. Dawsey testified that defendant was involved in a violent altercation around Thanksgiving. While both the testimony from Dawsey and Hillery was probative of defendant’s character for violence it was also probative of how both men could testify regarding defendant’s identity, which is a proper purpose under MRE 404(b)(1). The evidence regarding defendant’s conduct around Thanksgiving demonstrated that Hillery and Dawsey had previously seen defendant, and therefore, made it more probable that they were able to identify him on the night of the shooting. Because the evidence here was not “relevant *solely* to the defendant’s character or criminal propensity,” there was no error in its admission. *Mardlin*, 487 Mich at 615-16.

Moreover, the probative value of the evidence 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.” *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (internal citations omitted).

Assessing probative value against prejudicial effect requires a balancing of several factors, including. . . how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case . . . and whether the fact can be proved in another manner without as many harmful collateral effects. [*Id.*]

The jury was presented with substantial evidence that defendant was the shooter, including his threats to return to the bar and shoot at it, Dawsey’s identification of defendant as the shooter, the description of defendant’s car as consistent with the shooter’s car, and forensics testimony that the shells recovered after the shooting were consistent with the type of weapon that defendant allegedly used when shooting. Accordingly, there was little danger that evidence regarding defendant’s conduct around Thanksgiving was given undue weight by the jury relative to other evidence of his guilt. Moreover, as noted, the testimony regarding defendant’s behavior around Thanksgiving tends to prove that Dawsey and Hillery were able to accurately identify defendant on the night of the shooting, which was essential to the case because identity is an essential element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Establishing that Dawsey and Hillery were able to identify defendant because they had seen him before would be difficult to establish without introducing evidence of the prior contact. Accordingly, the evidence is admissible under MRE 403 as it is not substantially more prejudicial than probative.

A limiting instruction may well have cured whatever minimal danger of prejudice may have existed, ensuring that the jury did not consider defendant’s character for violence. However, defendant did not object to this testimony or request a limiting instruction; in fact, his counsel relied upon it during cross-examinations. “In the absence of a request or objection, the appellate courts have declined to impose a duty on trial courts to give sua sponte limiting instructions.” *People v Rice*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Moreover, where,

as here, a limiting instruction would have alleviated any potential prejudicial effect of the testimony, this Court “will not find error warranting reversal.” *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that, when his trial counsel failed to object to the admission of testimony regarding his violent altercation around Thanksgiving, he was denied the effective assistance of counsel. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must either make a motion for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Here, defendant did not move for a *Ginther* hearing or a new trial in the lower court, and thus, the issue of ineffective assistance of counsel is unpreserved. Where claims of ineffective assistance of counsel have not been preserved, this Court’s review is limited to errors apparent on the record. *People v Lockett*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 296747 and 296848, issued January 10, 2012), slip op at 9.

“Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law.” *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), citing *People v Grant*, 470 Mich 477, 481; 684 NW2d 686 (2004). “The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

“To prove a claim of ineffective assistance of counsel, a defendant must establish [first] that counsel’s performance fell below objective standards of reasonableness and [second] that, but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different.” *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). “The defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *Matuszak*, 263 Mich App at 58. “In addition, trial counsel is not ineffective when failing to make objections that are lacking in merit.” *Id.*

Defendant argues that his counsel was ineffective in failing to object to testimony that, four weeks prior to the shooting, defendant had been violent at the very bar where the shooting occurred. However, defendant has failed to show that counsel’s failure to object fell below an objective standard of reasonableness. Indeed, an objection would likely have been futile, because, as explained above, this evidence was admissible under MRE 404(b)(1) and MRE 403. Even though this evidence was incidentally probative on defendant’s character for violence, it was also probative on Dawsey’s and Hillery’s ability to identify defendant on the night of the shooting (because they had seen him before), and was therefore admitted for a proper purpose. It was relevant because it tended to make more probable the fact that defendant was the shooter, and it was not substantially more prejudicial than probative. Accordingly, any objection defense

counsel might have made to this testimony would likely have been overruled, and it was therefore objectively reasonable for him not to object.

Nor has defendant shown that counsel's objecting to the testimony regarding his prior incident at the bar would have changed the outcome at trial. Indeed, it is likely that, even if this evidence had been excluded, defendant still would have been convicted. Dawsey testified that he was able to clearly see defendant's face during the shooting, and identified defendant as the shooter at trial. Although neither Reeves nor Hillery were able to see the shooter's face, both saw the shooter with a rifle, and forensic evidence demonstrated that the shots at the bar were fired from a gun consistent with that description. Defendant, shortly before the shooting, threatened to shoot at the bar. Accordingly, there was enough evidence for a jury to convict defendant even without the testimony regarding defendant's prior incident at the bar, and therefore, defendant has failed to show a reasonable probability that the outcome of his trial would have been different without it.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan