

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN CHRISTOPHER WEATHERS,

Defendant-Appellant.

UNPUBLISHED
October 31, 2000

No. 219141
Arenac Circuit Court
LC No. 98-002587-FH

Before: Talbot, P.J., Hood and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278,¹ and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). The convictions stemmed from defendant's shooting of a sleeping motorist at a highway rest stop during an attempt to rob the motorist and steal his vehicle. Defendant was sentenced to fifteen to forty-five years' imprisonment for the assault conviction, consecutive to two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial when the prosecutor introduced irrelevant and prejudicial other acts evidence without prior notice or a ruling from the trial court. Defendant specifically challenges testimony from three witness referring to the fact that he was driving a stolen truck on the night in question, and portions of a letter defendant wrote to his accomplice while he was in jail, stating that (1) had defendant been "staking out" the stolen truck as its owner allegedly told the authorities, he would have "smoked [the owner's] ass in his mu-fuckin crib & got his loot. Just kidding [sic]. Ha-Ha-mu-fuckin Ha!," and (2) that the authorities were testing blood found in the back of the truck because they thought defendant and his accomplice had "killed someone and put him in the back of the trunk and dumped the body in the woods." Because defendant did not object to the admission of the testimony and objected to the letter on grounds other than those asserted on appeal, our review is limited to determining whether he demonstrated plain error that was prejudicial, i.e., that could have

¹ The jury was permitted to consider the alternative charge of assault with intent to rob while armed, MCL 750.89; MSA 28.284.

affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Pursuant to MRE 404(b) evidence of other crimes, wrongs, or acts is admissible if the evidence is (1) offered for a proper purpose other than to prove the defendant's character or propensity to commit a crime (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); see also *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998); *People v Starr*, 457 Mich 490, 496; 557 NW2d 673 (1998). MRE 404(b)(2) requires the prosecution to provide reasonable notice in advance of trial of the general nature and rationale for any such evidence it intends to introduce at trial.

Our review of the record reveals that the prosecutor did not introduce or otherwise use the contested evidence at trial to prove defendant's character or propensity to commit the charged offenses. The introduction of the evidence simply did not implicate MRE 404(b), and the prosecutor was therefore not obligated to demonstrate a purpose under which such evidence would be admissible or to provide notice. See *People v Lukity*, 460 Mich 484, 499-500; 596 NW2d 607 (1999). To the extent the contested evidence could be characterized as other acts evidence, its admission did not result in unfair surprise and the mere lack of notice did not prejudice defendant. MRE 404(b)(2). In response to defendant's motion to suppress the letter, which included statements regarding the theft of the vehicle, the trial court redacted certain parts and specifically ruled that the remainder would be admissible at trial.

Further, testimony from the three witnesses regarding the stolen vehicle would have been admissible under the res gestae exception to MRE 404(b), which allows evidence of other criminal acts when those acts are "so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 359 (1978). The police officers' brief references to the fact that they either discovered defendant was driving a stolen vehicle during a high speed chase or that they were pursuing the vehicle because it was stolen was merely foundational and intended to explain the circumstances which ultimately led to defendant's arrest. The inmate's testimony that defendant told him he was driving a stolen vehicle, that he wanted to get rid of it because the police were going to be looking for him, and that he wanted to exchange it for the victim's vehicle was also needed to give the jury "an intelligible presentation of the full context in which the disputed events took place." *Sholl, supra* at 741.² Finally, the prosecutor introduced defendant's lengthy letter because it contained statements confirming defendant's participation in the instant offense. Although the two contested portions were minimally relevant in providing a context for the incriminating statements, we cannot conclude that the probative value of those statements or other evidence was

² The inmate's testimony would have also been admissible under MRE 404(b) to establish defendant's motive and intent to rob or murder the victim. See *VanderVliet, supra* at 74 and *People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997).

substantially outweighed by the danger of unfair prejudice. MRE 403. Consequently, defendant has failed to demonstrate plain error that affected his substantial rights. *Carines*, *supra* at 763-764.

Defendant next argues that the prosecutor's remarks and questioning denied him a fair trial. Again, because defendant did not object to the alleged misconduct at trial, our review is limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *Carines*, *supra* at 763-764. Prosecutorial misconduct issues are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *Schutte*, *supra* at 720. After contextual review, we conclude that each alleged instance of misconduct constituted proper argument and questioning or was an appropriate response to defendant's cross-examination and closing argument. *Schutte*, *supra* at 721. Moreover, any prejudice resulting from the prosecutor's conduct was dispelled by the trial court's instructions to the jury, see *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995), or could have been cured by a timely objection and instruction. *Schutte*, *supra* at 721, citing *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Defendant is therefore not entitled to relief with respect to this issue.

Finally, defendant argues that the trial court abused its discretion in allowing a detective to testify that the accomplice told him that, prior to the incident in question, she and defendant had discussed shooting someone only as a "last resort." Defendant contends that the hearsay statement was improperly admitted as either an inconsistent or consistent statement under MRE 801(d). We hold that any error in the trial court's decision to admit the contested statement was harmless.

"A preserved nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that is more probable than not that the error was outcome determinative." *Lukity*, *supra* at 495-496, quoting MCL 769.26; MSA 28.1096. Thus, reversal is only required if the error is prejudicial, and the appropriate inquiry "focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Id.*, citing *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The object of the inquiry is to determine if it affirmatively appears that the error asserted "undermine[s] the reliability of the verdict." *Id.*, citing *Mateo*, *supra* at 211. "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted in error." *Id.*

In this case, one of the pivotal issues was whether defendant possessed the requisite intent to support a conviction for assault with intent to commit murder. At trial, the accomplice testified that when the victim did not respond to their attempt to wake him up, defendant aimed the gun at the victim and pulled the trigger. The accomplice also testified that defendant told her that he shot the victim to "get rid of him as a witness" so that the victim could not testify against him. A fellow inmate testified that defendant told him that although he originally only intended to rob the victim and steal his vehicle, he became frustrated when the victim would not wake up, that he stated "Fuck this mother fucker, I'm going to shoot him," and that he intentionally shot the victim in the face. The inmate's and the accomplice's testimony regarding the basic events which transpired on the night in question were consistent with each other, the victim's injuries, and defendant's own admissions in his letter to his

accomplice. In light of this evidence, defendant has not demonstrated that it is “more probable than not” that the exclusion of codefendant’s single statement – that she and defendant discussed shooting their victim only as a last resort – would have resulted in a different outcome. *Lukity, supra* at 497. Accordingly, this preserved, nonconstitutional error is not a proper ground for reversal of defendant’s convictions.

Affirmed.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage