

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MALCOLM RIDGEWAY,

Defendant-Appellant.

UNPUBLISHED

December 28, 2001

No. 221290

Wayne Circuit Court

LC No. 98-007768

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of voluntary manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant, as an habitual offender, to a term of five years' imprisonment on the felony-firearm conviction and a term of 15 to 22½ years on the voluntary manslaughter conviction. We affirm.

I. Jury Instructions

First, defendant argues that the court erroneously denied his request to re-read the self-defense instruction to the jury. This Court reviews claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). We review jury instructions as a whole to determine whether there is error requiring reversal. *Id.* The instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them. *Id.* Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights. *Id.* at 143-144.

Defendant concedes that the court read the self-defense instruction. However, he argues that the trial court erred in repeating for the jury its instructions regarding first and second-degree murder and voluntary manslaughter, but failing to repeat its instructions regarding self-defense. We note that the jury asked the trial court to re-read the instructions regarding first and second degree murder and voluntary manslaughter, but made no such request regarding the self-defense instructions. "It is not an abuse of discretion for a trial court to fail to repeat instructions addressing areas not covered by a jury's specific request." *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998). The jury had ample opportunity to ask the court to repeat or explain any instruction and declined to do so.

The jury instructions that the court read in this case fairly presented the issues to be tried and sufficiently protected defendant's rights. Any tendency the jury may have had to accord undue emphasis to the repeated instructions was cured by the court's specific instructions not to emphasize any one instruction and to consider all of the instructions given. Defendant does not argue that the instructions were deficient in any other respect. Therefore, the court did not abuse its discretion by refusing to repeat an instruction which the jury did not request.

II. Prior Acts Testimony

Next, defendant argues that the court erroneously admitted what he describes as prior "bad acts" evidence. Specifically, defendant argues that the court erroneously admitted the testimony of Don Stewart, indicating that he and defendant had a previous disagreement in which defendant hit, stabbed, and robbed Stewart. In addition, defendant argues that the trial court erroneously admitted the testimony of Cynthia Kennedy, indicating that defendant used drugs and associated with a prostitute. We conclude that defendant's argument is without merit.

Defendant failed to object to the introduction of this evidence at trial, and therefore failed to preserve this issue for appeal. In order to avoid forfeiture of an unpreserved issue under the plain error rule, an appellant must show: 1) that an error occurred, 2) "that the error was plain, i.e., clear or obvious," 3) and that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This test applies to unpreserved allegations of both constitutional and nonconstitutional error. *Id.* at 763-764. Once an appellant has satisfied these three requirements, an appellate court must "exercise its discretion in deciding whether to reverse." *Id.* at 763. Reversal is warranted only when the plain, unpreserved error resulted in "the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763 (internal punctuation omitted).

MRE 404(b) governs admission of evidence of bad acts. That rule provides:

(1) 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.

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.* at 496-497.

A. Testimony of Don Stewart

Stewart's testimony that defendant previously hit, stabbed, and robbed him was only a small portion of Stewart's lengthy testimony regarding the ongoing, acrimonious relationship between himself and defendant. Specifically, Stewart testified that defendant and his girlfriend blamed him for involvement in the alleged sale of "fake" crack cocaine. Subsequently, when defendant hit, stabbed, and robbed Stewart, defendant again accused Stewart of cheating his girlfriend. Finally, on the day of the homicide, Stewart and the victim encountered defendant at a crack house, where a verbal and physical confrontation ensued. According to Stewart, he and the victim fled the house, and defendant followed them out to their car, where he shot the victim and chased Stewart for several blocks. Stewart's testimony was therefore offered to explain defendant's motive, i.e., defendant was still angry with Stewart about the "fake crack" deal, and was angry at both Stewart and the victim for beating him at the crack house. We conclude that the prosecutor introduced evidence regarding defendant's prior conflict with Stewart for the proper purpose of showing motive. "Proof of motive in a prosecution for murder, although not essential, is always relevant, and evidence of other acts to prove motive is admissible under MRE 404(b)(1)." *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

Such evidence also tells the "complete story" and is admissible for that purpose. See *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). In the present case, it was necessary for the jury to hear the history of the relationship between defendant, Stewart and the victim. It was especially important for the jury to understand the context of the altercation which led to defendant's act of killing the victim and shooting at Stewart, in light of defendant's claim that he did so in self-defense. The testimony shed light on the theory that defendant was still upset with Stewart over the crack deal and also explained how Stewart, the victim, and defendant all ended up at the same house. The previous altercation with Stewart constituted an antecedent event from which the shooting followed. Thus, the testimony was admissible to tell the jury the "complete story."

Although defendant also argues that Stewart's testimony was irrelevant, we disagree. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000). Stewart's testimony made it more probable that defendant shot at Stewart and the victim in order to seek revenge, rather than acting in self-defense. Relevant evidence is simply material evidence with probative value. *Id.* at 57. To be material, evidence need not be directed at any element of a crime or defense; rather, a material fact is one that is within the range of litigated matters in controversy. *Id.* The issue of what prompted defendant to shoot at Stewart and the victim was not only within the range of litigated matters—it was the principal litigated matter. Moreover, the purpose of admitting relevant evidence "is to provide the trier of fact with as much useful information as possible." *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). It was not merely useful, but crucial, for the jury to know about defendant's past dealings with Stewart and the victim in order to make an informed decision.

Defendant also argues that the unfair prejudice occasioned by Stewart's testimony outweighed its probative value. Again, we disagree.

All evidence offered by the parties is “prejudicial” to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded. [*People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995), (emphasis in original).]

Simply put, “unfair prejudice” does not mean “damaging.” *Id.* The ongoing controversy which characterized defendant’s relationship with Stewart and the victim concerned a drug deal gone bad. It would have been extremely confusing to the jury to isolate defendant’s act of shooting from the context in which it occurred. We conclude that the probative value of Stewart’s testimony was not substantially outweighed by the danger of unfair prejudice. Thus, the testimony was properly admitted.

B. Testimony of Cynthia Kennedy

Defendant also argues that the trial court erroneously admitted evidence which showed that defendant used drugs and associated with a prostitute. Defendant refers to that portion of the record containing Cynthia Kennedy’s testimony. Kennedy testified that she was a prostitute and defendant was her date. She testified that when the two spent time smoking crack cocaine in a hotel room, she did not notice any injuries on defendant’s face or head. Finally, she testified that police arrested both of them in the hotel room, but never found the drugs.

Like Stewart’s testimony, Kennedy’s testimony was admissible in order to tell the jury the “complete story.” The apparent reason that Kennedy was called to testify was because defendant confessed to her that he had killed the victim—an admission by a party-opponent which was admissible under MRE 801(d)(2)—and Kennedy testified that defendant was “bragging” about it. The remainder of Kennedy’s testimony was incidental to this confession, and simply completed the story of why the two were together, as well as when and where. The fact that the two were smoking crack helped explain why defendant would confess to someone he had met only hours earlier. The fact that Kennedy was a prostitute would explain why she had “face to face” contact with defendant and an opportunity to observe whether he had any injuries. Kennedy’s testimony went to the extent and severity of the injuries defendant sustained to his face and head during the altercation with Stewart and Wilson, which was an essential aspect of defendant’s self-defense theory. Defendant argued that after Stewart and Wilson severely beat him in the head, he shot the victim and attempted to shoot Stewart because he feared for his life. Thus, it was relevant and material that Kennedy observed no injuries on defendant’s head or face, thirteen days after the shooting. In addition, the prejudicial effect of Kennedy’s testimony did not outweigh its probative value. Kennedy’s statement that defendant bragged about killing a man named “Steel” (the victim’s alias) was highly probative to whether defendant had killed the victim in self-defense.

More importantly, even assuming that Kennedy’s testimony should not have been admitted, we conclude that this testimony did not affect the outcome of the trial. Stewart’s testimony alone could have supported defendant’s conviction. Additionally, testimony from several other witnesses supported the conviction, including that of Robert and Angela Blackburn, Isaiah Smith, Susan Simpson, Tim Dewar, and Arthur Evans. Given the overwhelming evidence against defendant, Kennedy’s testimony in this regard was harmless.

III. Prosecutorial Misconduct

Next, defendant argues that the prosecutor engaged in misconduct by failing to give defendant notice that he intended to introduce the “bad acts” testimony discussed above, by introducing Kennedy’s testimony regarding defendant’s confession, and by making improper remarks in closing argument. Defendant asserts that the “sum total” of these errors requires reversal. We disagree.

Defendant did not object to the “bad acts” testimony discussed above. Defendant initially objected to Kennedy’s testimony on the basis that she was unable to positively identify defendant. However, he subsequently withdrew that objection. Defendant does not specify which portion of plaintiff’s closing argument he contends was improper, and thus defendant has not properly preserved his argument that plaintiff made improper remarks during closing argument. We thus review for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Defendant correctly notes that plaintiff failed to provide notice of its intent to introduce bad acts evidence under MRE 404(b)(2). That rule provides:

The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationales, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant’s privilege against self-incrimination.

Even assuming that the prosecutor committed plain error by securing admission of the challenged evidence without prior notice, we conclude that such error would not require reversal. As in *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001), there is no indication in the record that defendant was “actually innocent” or that the alleged error seriously affected the “fairness, integrity, or public reputation of judicial proceedings,” under *Carines*, *supra* at 763. Also as in *Hawkins*, *supra* at 455, the “bad acts” evidence challenged by defendant was relevant, admissible, and was not substantially more prejudicial than probative. Therefore, notice to defendant would not have affected the admissibility of this evidence at trial. Further, as in *Hawkins*, defendant has failed to provide any indication of how he would have proceeded differently, had he been given notice. *Id.* Thus, we cannot conclude that the absence of notice had any significant effect on the proceedings.

Finally, the facts in this case are distinguishable from *People v Ullah*, 216 Mich App 669, 673-676; 550 NW2d 568 (1996), upon which defendant relies. In *Ullah*, several factors—not just the prosecutor’s failure to provide notice under MRE 404(b)(2)—mandated reversal of the defendant’s conviction. In the present case, the evidence was offered for a proper purpose, the evidence was logically relevant to elements of the charged offenses, and the evidence was not more prejudicial than probative. Furthermore, there is no indication that the jury gave undue weight to the other “bad acts” testimony, especially in light of the fact that the jury found defendant guilty of manslaughter, rather than first or second-degree murder, and found him not guilty of the assault charges. Thus, we conclude that reversal is not warranted.

Defendant also contends that the prosecutor engaged in misconduct by introducing that portion of Kennedy's testimony in which she testified that defendant "bragged" about killing a man named "Steel." Specifically, defendant argues that Kennedy's testimony in this regard was irrelevant and that the prosecutor failed to comply with MRE 104(b). That rule provides:

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Initially, defense counsel objected to Kennedy's testimony on the basis that she could not positively identify defendant. The court allowed the testimony on the condition that it could be "tied up" through the testimony of another witness. Defense counsel expressly withdrew his objection, contingent on the prosecutor's ability to "tie up" the testimony. Subsequently, the prosecutor did "tie up" the identification of defendant via the testimony of Officer Lewis, who testified that he arrested defendant and Kennedy in a hotel room on June 26, 1998. Defense counsel never reinstated any objection to the testimony. Therefore, defendant has waived this particular claim of error on appeal. "A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal." *Aldrich, supra* at 111, citing *People v Fetterley*, 229 Mich App 511; 583 NW2d 199 (1998). Furthermore, the condition of fact which made Kennedy's testimony relevant was fulfilled, and MRE 104(b) was therefore satisfied.

Defendant also argues that Kennedy's testimony was irrelevant under MRE 401 because he never denied killing Wilson. We disagree. Kennedy's testimony was relevant because it shed light on defendant's intent and state of mind at the time he shot Wilson. Kennedy's testimony that defendant was "bragging" was directly relevant to whether defendant acted in self-defense, and passed the threshold of MRE 401. Thus, Kennedy's testimony in this regard was relevant and properly admitted under both MRE 401 and MRE 104(b).

Defendant also argues that the prosecutor "violated his rights" by introducing the "bad acts" testimony discussed above. For reasons previously discussed, such evidence was properly admitted. Defendant asserts that the "sum total" of the prosecutor's errors resulted in an unfair trial. Because we conclude that the prosecutor committed no single error requiring reversal, this assertion is without merit. Further, defendant contends that the prosecutor made improper remarks during closing argument, but does not cite any particular portion of the transcript. Our review of the record convinces us that the prosecutor neither engaged in misconduct nor violated defendant's due process rights.

IV. Ineffective Assistance

Defendant next argues that his trial counsel was ineffective for failing to object to the introduction of bad acts evidence under MRE 404(b)(2). We disagree.

For reasons discussed above, the "bad acts" evidence was properly admitted, and any objection by counsel would have been meritless. "A trial attorney need not register a meritless objection to act effectively." *Hawkins, supra* at 457. As in *Hawkins*, we "dispense with an in-depth analysis of this argument in light of our conclusion that this evidence was admissible." *Id.* at 456-457. Further, because such failure had no practical effect on defendant's strategy, and was not outcome determinative, counsel's failure to object did not affect the result of the

proceedings. Defendant has not shown that but for counsel's error, the result of the proceedings would have been different. Accordingly, defendant has not established an ineffective assistance of counsel claim.

V. Great Weight of the Evidence

Lastly, defendant argues that the verdict is against the great weight of the evidence. Defendant failed to preserve this issue by motion for new trial. See *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). Therefore, this issue is not preserved for appellate review and this Court need not address it absent manifest injustice. *Id.*

The evidence in this case did not clearly weigh in defendant's favor. There was ample testimony supporting defendant's conviction. The gist of defendant's argument is that "Mr. Stewart [sic] was the only witness who offered what could be even remotely described as credible testimony" and Stewart's testimony was not sufficient to support his conviction because it was "all made up."

First, defendant's argument that the prosecution "relied exclusively" upon Stewart's testimony is not supported by the record. To the contrary, the prosecution relied on the incriminating testimony of the Blackburns, Dewar, Simpson, Kennedy, Evans, and two police officers, in addition to Stewart's testimony. Further, defendant's own testimony and his own statement, read into the record by Officer Smith, supported his conviction. The evidence presented at trial was clearly sufficient to support the jury's verdict.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot