

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD EVERETT VAN HAZEL,

Defendant-Appellant.

UNPUBLISHED

June 21, 2002

No. 232030

Oakland Circuit Court

LC No. 00-171989-FH

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316, attempted kidnapping, MCL 750.92; MCL 750.349, carrying a concealed weapon, MCL 750.227, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of life for the conviction of conspiracy to commit murder, three and a half to fifteen years for the conviction of attempted kidnapping, and two to seven and a half years for the conviction of carrying a concealed weapon, to be served consecutive to two concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right, and we affirm.

Defendant first argues that he was denied a fair trial by the admission of evidence of his involvement in an anti-government militia, his responsibilities and activities in connection with that group, and a resultant federal prosecution. Prior to trial, the court granted the prosecutor's motion to admit such evidence under MRE 404(b) for the purpose of showing motive. At trial, IRS investigator Joseph O'Connell testified that in 1985 he investigated threats toward IRS agents by members of a group calling itself "The Committee of the States." Defendant was the "chief marshal" of that group's military arm, known as "The Unorganized Militia." Defendant was responsible for carrying out death "sentences" imposed by The Committee of the States against IRS agents. In 1986, defendant was prosecuted for mailing threatening communications to IRS agents. The trial court instructed the jury that it could consider the evidence only as it may tend to show defendant's motive, intent, absence of mistake, or proof of a scheme or plan.

The decision to admit other-acts evidence is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say

there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (2001).

“Under MRE 404(b)(1), evidence of other acts may be admitted if (1) it is offered for a proper purpose, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice.” *Rice (On Remand)*, *supra* at 439-440 (footnote omitted), citing *Crawford, supra* at 385. A proper purpose is one other than establishing the defendant’s character to show his propensity to commit the offense. *Crawford, supra* at 390. MRE 404(b)(1) provides:

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.

See *People v Watson*, 245 Mich App 572, 576-577; 629 NW2d 411 (2001). “Establishing motive is among the purposes for which prior-acts evidence is expressly admissible.” *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997). “Motive” has been defined by this Court as “that which incites or stimulates a person to do an act.” *Id.* at 106.

The trial court did not abuse its discretion in admitting the prior-acts evidence for the purpose of showing defendant’s motive to commit the instant offenses. The question of motive was highly relevant. See *Rice (On Remand)*, *supra* at 440. As defendant acknowledges in his brief on appeal, the only disputed issues in this case were whether defendant intended to kill Gary Canu, and whether he conspired with Troy Coe toward that end. Canu was an accountant who had testified in a federal tax case brought by the IRS against a friend of defendant. Evidence of defendant’s prior association with an anti-government organization, his position as “chief marshal” of a division whose function was to carry out death threats against IRS agents, and his prosecution for threatening IRS agents tended to show that defendant had a motive to kill. The evidence was probative of whether defendant intended to kill Canu, as opposed to merely frighten or intimidate him, and made the existence of an intent to kill and a conspiracy to murder more likely than it would be without the evidence. MRE 401; *Rice (On Remand)*, *supra* at 440-441. The highly probative value of the evidence was not outweighed by its prejudicial effect. MRE 403. Accordingly, we conclude that the trial court properly admitted the evidence for the purpose of showing defendant’s motive.

With respect to the other purposes for which the evidence was admitted, defendant has waived review of this issue. Although the prosecutor sought to admit the evidence to show a plan, scheme or system of doing an act, in addition to motive, the trial court’s pretrial ruling only indicated that the evidence was admissible to establish motive. Following O’Connell’s testimony, the court gave a cautionary instruction that encompassed all permissible purposes under MRE 404(b), and the court repeated this instruction when it charged the jury. Defendant did not object nor did he ask the court to give a curative instruction limiting the use of the evidence to showing motive in accordance with the pretrial ruling. Moreover, defendant expressly stated that he had no objection to the jury instructions as given. Accordingly, to the

extent defendant challenges the admission of the evidence for other purposes under MRE 404(b), defendant's waiver has extinguished any error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant also argues that the prosecution deliberately misled the jury regarding the benefit Coe received from testifying at defendant's trial. Defendant maintains that the prosecutor elicited testimony from Coe and argued to the jury that the only benefit Coe received in exchange for his testimony was the dropping of the felony-firearm charge which carries a mandatory two-year sentence. Defendant argues that Coe benefited to a greater extent because by the terms of his agreement with the prosecutor, Coe avoided prosecution for conspiracy to commit murder. Defendant alleges error in the prosecutor's failure to correct Coe's testimony and the resulting distortion of the actual benefit Coe received for his testimony. Defendant further claims that the jury's misapprehension was compounded by the prosecution's closing argument which minimized the benefit received by Coe.

This issue is not preserved for appeal because defendant did not object below. Accordingly, we review for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

Issues of prosecutorial misconduct are decided case by case. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), citing *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair trial. *Id.* "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001), citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).

Where an accomplice or co-conspirator has been granted immunity or other leniency to secure his testimony, it is incumbent upon the prosecutor and the trial court to disclose such facts to the jury upon defendant's request. *Bahoda, supra* at 278 n 28. "The disclosure requirement may be considered satisfied where the jury [is] made well aware of such facts by means of . . . thorough and probing cross-examination by defense counsel." *People v Mumford*, 183 Mich App 149, 152-153; 455 NW2d 51 (1990).

There is no indication that the prosecutor was attempting to mislead the jury or to conceal the details of the agreement, nor does the record support defendant's claim that Coe gave false testimony. The prosecutor asked Coe what he "believed that the time is that he saved [him]self by testifying in this case." Coe testified that he was saving himself twenty-four months in prison, and that if he lies, the agreement is no longer valid and his statement may be used against him. In closing argument, the prosecutor accurately stated that Coe had not been charged with conspiracy. Although the prosecutor did not specifically elicit testimony that Coe benefited by avoiding conspiracy charges, Coe testified to the terms of the agreement, including the fact that his statement was conditioned on the prosecutor's promise not to use the statement against him. Notably, on cross-examination, defense counsel elicited testimony from Coe that he was not charged with conspiracy to murder and that he is not facing life in prison. Moreover, the trial

court's instruction to the jury regarding the use of accomplice testimony included the statement, "The evidence clearly shows that Troy Coe is guilty of the same crime the Defendant is charged with," thereby telling the jury that Coe's agreement effectively protected him from prosecution for the same charge defendant was facing. We find no error.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot