

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES D. THOMAS,

Defendant-Appellant.

UNPUBLISHED

December 27, 2002

No. 234787

Wayne Circuit Court

LC No. 01-001932

Before: Bandstra, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a bench trial, of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two years' probation on the assault conviction to run consecutive to a two-year prison term for the felony-firearm conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS

The victim, Jesse Hooks, had known defendant since 1992, and both men had, at one time or another, a relationship with Rhonda Cook. Hooks and Cook had two children together, and on the morning of January 24, 2001, they dropped their daughter off at school and noticed defendant nearby sitting in his car. There had been a history of altercations between defendant and Hooks, including incidents where defendant followed Hooks and had shot at him. Hooks, after seeing defendant and being concerned for his safety, approached a police officer who was giving someone a ticket. Hooks pointed out defendant to the officer and indicated that defendant carried a gun. The officer took Hooks' name and said he would look into the matter after completing the ticket. Hooks testified that he had not actually seen a gun at that point of time, rather he assumed defendant was carrying a gun based on past experience.

Hooks and Cook then drove away before the officer could approach defendant, and defendant followed them at a high rate of speed. At a stop sign, Hooks' vehicle stopped, Cook was driving, and defendant stopped right behind them. Hooks exited the car carrying a steering wheel locking device and ran towards defendant. Hooks testified that he did so because he was tired of having to constantly look over his shoulder for defendant. As Hooks was nearing the driver's side of defendant's vehicle, defendant exited his vehicle with a gun and shot once at Hooks but missed him. Defendant then got back in his car; however, Hooks charged at him and

dove through the open driver's side window ending up laying across defendant in the driver's seat. Hooks wrestled the gun away from defendant by biting him in the hand, and the gun fell to the floor. The two then continued to fight in the car while Cook pulled ahead in her vehicle.

Defendant was able to put the car in gear and accelerate into the intersection while fighting with Hooks, but the car hit another car entering the intersection. Defendant and Hooks continued to fight until the police arrived and stopped the fight, which had spilled over to the backseat of the car. The officer, who was first alerted about defendant by Hooks, was one of the officers to respond; he had lost sight of defendant's car in the school traffic after trying to follow him. At the accident scene, the officer recognized Hooks and defendant's vehicle, and he had both men exit the vehicle, and they were both placed in handcuffs. On approaching defendant's vehicle, the officer was told by Cook that "he just fired twice[;] [t]hat's the guy I'm pointing to." The officer did not see a gun nor did he personally know who had the gun; however, another officer found a gun in defendant's car on the front passenger side floor board. The driver of the vehicle that was struck in the intersection testified that she did not see anyone shoot a gun, but she did see Hooks and defendant wrestling in the car. The driver testified that she saw a gun, although her testimony was confusing at best with regard to who had control of the gun. Another witness saw Hooks and defendant wrestling in the car after the accident; she did not testify to seeing a gun. Cook did not testify.

Defendant was injured in the fight, including a cut to the forehead, a black eye, and a bruised lip, and he was taken to a hospital. Testifying officers did not recall any bite injuries to defendant's hand. The gun was not registered to either defendant or Hooks, and it had been reported stolen sometime earlier. There was no forensic evidence tying the gun to defendant. Defendant argued below that there was insufficient evidence that he had the gun, and even if he had the gun, Hooks was the aggressor and defendant acted in self-defense. The trial court found that Hooks' testimony was credible, and it did not believe that Hooks would have jumped through the window of defendant's car had he had the gun because there would be no need to do so. The trial court found that defendant was the aggressor by following Hooks and Cook, as he had done in the past. The trial court also recognized the prior occasions on which defendant had shot at Hooks as part of the court's analysis in identifying the aggressor and addressing the self-defense claim by defendant.

II. ANALYSIS

A. Right to Remain Silent and Ineffective Assistance of Counsel

Defendant refused to make a statement to police, and this was referenced by the prosecutor in closing argument without objection from defense counsel. Defendant claims that this violated his constitutional right to remain silent pursuant to the Fifth Amendment, in that, the prosecutor used his silence as substantive evidence of guilt. Moreover, defense counsel's failure to object constituted ineffective assistance of counsel according to defendant.

The prosecutor argued as follows during closing argument:

You know – bringing out the fact that the defendant refuses to give a statement, but it was brought out. And that also gives credibility to Mr. Hooks. Mr. Hooks gave a statement that day, Ms. Cook gave a statement that day, Ms.

Williams gave a statement that day, Ms. Cavitt gave a statement that day, but Mr. Thomas does not. And that speaks volumes.

We find that the prosecutor's comments constituted improper argument and that defense counsel was ineffective for failing to object; however, defendant suffered no prejudice.

If a defendant chooses to exercise his right to remain silent, that silence cannot be used against him at trial. *People v Jones*, 168 Mich App 191, 193; 423 NW2d 614 (1988). This rule is designed to prevent a jury from drawing inculpatory inferences from a defendant's refusal to submit to interrogation. *Id.* at 194. Here, however, defendant was tried in a bench trial, and the *Jones* panel noted a distinction in analyzing improper evidence or argument between a jury trial and a bench trial.

In the instant case, the prosecution did elicit testimony from the investigating officer that defendant had invoked his right to silence. This was error. However, while we do not condone the prosecution's behavior, we conclude that the error was harmless. Defendant was tried before a judge, not a jury. A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial. From our review of the record, we conclude that the trial judge did just that. [*Id.*]

A thorough review of the trial court's decision finding defendant guilty reflects no reliance whatsoever on defendant's failure to provide a statement, nor would we expect the learned trial judge to do so. In the context of defendant's arguments on this unpreserved claim of error, including the ineffective assistance of counsel claim, defendant did not suffer prejudice; therefore, there is no basis for reversal. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Hearsay Testimony

Defendant next argues that the trial court erred in allowing hearsay testimony by the officer, who was first alerted by Hooks about defendant, with regard to the statement by Cook that "he just fired twice[;] [t]hat's the guy I'm pointing to."

A trial court's decision to admit evidence is reviewed by this Court for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001). If the decision to admit evidence involves a question of law, this Court reviews the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). MRE 801(c) provides that hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The prosecutor argued, and the trial court agreed, that the testimony simply went to show the reasons for the officer's action at the crime scene. We find it clear from the context of the testimony that the officer was explaining his actions and movements at the scene; therefore, the statement was not admitted to prove the truth of the matter asserted. Moreover, based on the circumstances Cook found herself in, the statement would qualify as a present sense impression pursuant to the hearsay exception in MRE 803(1). Additionally, we note that the statement does

not even clearly identify who Cook was referring to when she made the statement, and the trial court's ruling does not place any reliance on the statement, thereby making any error harmless. MCL 769.26; *Lukity, supra* at 495.

C. Similar Bad Acts and Ineffective Assistance of Counsel

Defendant finally argues that he was denied a fair trial where the trial court convicted him on the basis that defendant had previously shot at Hooks, and he argues that defense counsel was ineffective for failing to object to the similar acts evidence.

The admission of similar acts evidence pursuant to MRE 404(b) is reviewed for an abuse of discretion. *Knapp, supra* at 378. The *Knapp* panel stated:

Pursuant to MRE 404(b), evidence of other crimes or wrongs "is not admissible to prove the character of a person in order to show action in conformity therewith." However, other acts evidence may 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." MRE 404(b). Other acts evidence must be offered for a proper purpose under the rule, the evidence must be relevant, and its probative value must not be substantially outweighed by unfair prejudice. [*Knapp, supra* at 378-379, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

It is insufficient for the proponent of the evidence to merely recite one of the purposes articulated in MRE 404(b). *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The proponent must also explain how the evidence relates to the recited purposes. *Id.*

Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. . . . The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.* at 387-388 (citation omitted).]

Here, we find that the introduction of the evidence was for a proper purpose, relevant, and not substantially outweighed by unfair prejudice. Defendant's position was that either he never had the gun, or even if he had the gun, Hooks was the aggressor and defendant's actions were in self-defense. The past history of the relationship between defendant and Hooks was very relevant in assisting the court in identifying the aggressor and establishing intent. The evidence was relevant in negating any self-defense claim.

In *People v Daoust*, 228 Mich App 1, 13; 577 NW2d 179 (1998), this Court stated that prior acts are properly admitted to place the charged activity in context by assisting the trier of fact to better understand the dynamics of the relationship between the parties. That principle applies equally here considering the nature of the crime and defense.

With regard to defendant's argument that no notice was provided pursuant to MRE 404(b)(2), any error does not warrant reversal and was harmless considering the admissibility of the evidence, and because defendant does not identify how he would have proceeded differently had notice been provided. *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

Finally, there is no basis for a claim of ineffective assistance of counsel where there is no showing of prejudice. *Carbin, supra* at 599-600.

Affirmed.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Richard Allen Griffin