STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2004
v	No. 246330 Wayne Circuit Court
JOHN F. COOPER, Defendant-Appellant.	LC No. 02-001616-01

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), four counts of assault with intent to murder, MCL 750.83, and arson, MCL 750.72. Defendant was sentenced to life in prison for the first-degree murder conviction, and life in prison for each count of assault with intent to murder. Defendant's arson conviction was merged into the first-degree felony murder conviction and the first-degree felony murder conviction was merged into the first-degree murder conviction. We affirm.

I. FACTS

In June of 2001, Gloria O'Bryant lived at 15940 Log Cabin in the city of Detroit, along with her brother, sister, brother-in-law, and the victim, her eight-year-old nephew Marcus Johnson. In early June of 2001, O'Bryant loaned a dress to an acquaintance. When the acquaintance did not return the dress, O'Bryant went to retrieve the dress from the acquaintance's house, armed with a knife. At the house, O'Bryant got into an argument with defendant and defendant's cousin. As she was leaving, someone from inside the house fired two rounds into the air. The following day, someone broke defendant's car window. Defendant was angry and said that he was going to seek revenge on whoever broke his window.

On June 5, 2001, at approximately 4:00 a.m., defendant threw a Molotov cocktail[1] through a bedroom window at O'Bryant's house. He then threw another Molotov cocktail

[1] A glass bottle full of gasoline and stuffed with a rag that is ignited.

through the living room window that exploded next to the couch where Marcus was sleeping. Attempts to rescue Marcus from the burning house were unsuccessful and he died.

Dwight Pickett, one of defendant's best friends, testified that he went to defendant's house on June 5, 2001, at approximately 1:30 a.m. Pickett stated that defendant was upset because someone had busted out his car window and was threatening to blow up someone's house. Pickett testified that he and defendant left defendant's house at approximately 2:00 a.m. and went to 15940 Log Cabin to scope out the house. Next, they went to defendant's girlfriend's house to retrieve a gas can. Pickett and defendant drove to the gas station to purchase gas, then drove to defendant's cousin's house, and then finally drove to a park where defendant made firebombs out of glass beer bottles and gasoline. Pickett claims that after defendant made the firebombs, Pickett left the park and went home. Both Pickett and defendant were arrested and charged in this case. Pickett went to trial and was found not guilty. Defendant, on the other hand, was convicted and this appeal ensued.

II. PRIOR BAD ACTS

Defendant first argues that the trial court erred in admitting evidence of defendant's prior bad acts pursuant to MRE 404(b). We disagree.

A. Standard of Review

A trial court's determination of evidentiary issues is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), citing *People v Adair*, 452 Mich 473, 482; 550 NW2d 505 (1996). "Close questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently." *Smith, supra* at 550, citing *People v Bahoda,* 448 Mich 261, 289; 531 NW2d 659 (1995). The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Smith, supra* at 550.

B. Analysis

MRE 404(b) states:

> 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.

The Michigan Supreme Court, in *People v Vandervliet,* 444 Mich 52, 75; 508 NW2d 114 (1993), set forth the requirements for admissibility of MRE 404(b) evidence. It stated that (1) the evidence must be offered for a proper purpose under MRE 404(b), (2) the evidence must be relevant, as require under MRE 402, (3) the probative value must substantially outweigh the

danger of unfair prejudice under MRE 403, and (4) upon request, the trial court must instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it is admitted. *Id*. at 74.

At a pre-trial motion to permit "other acts evidence," the prosecutor sought to have testimony admitted that defendant was involved in the drug trade, and the trial court allowed the evidence. Defendant now claims that the trial court erred in allowing a witness to testify regarding defendant being a drug dealer. At trial, however, the witness did not testify that defendant was a drug dealer. In fact, he did not even mention drugs or drug dealing during his testimony at trial. The witness merely testified regarding the events that occurred on June 5, 2001, before the firebombing. Specifically, the witness testified that defendant was angry because someone busted his car window out and wanted revenge. He further testified that he and defendant drove by the house on Log Cabin, then defendant retrieved a gas can, filled it with gasoline and made firebombs out of bottles and gas. The witness stated that he left defendant and went home before the firebombing occurred.

We conclude that the witness' testimony did not amount to evidence of other crimes, wrongs, or acts on behalf of defendant, but rather was an explanation of the events that occurred immediately before the firebombing. We further conclude that the testimony was relevant as it made it more probable that defendant was the perpetrator of the crime, and its probative value was not substantially outweighed by its prejudicial effect. Defendant's claim that the testimony constituted improper prior bad acts testimony is a mischaracterization of the evidence. Evidence regarding defendant being involved in the drug trade was not introduced, and therefore, defendant's claim is without merit.

Second, defendant claims that testimony offered during trial regarding defendant shooting a firearm was improper bad acts evidence under MRE 404(b) because the prosecutor did not provide the defense with notice that this evidence was going to be used at trial and because the evidence was more prejudicial than probative. Defendant further claims that the evidence was irrelevant and admitted for an improper purpose. The trial court noted that the defense was on notice regarding defendant's prior bad acts, although not particularly this one. However, the trial court also noted that there was a reference to this information in the discovery materials and that the issue is one of weight rather than admissibility. The prosecution noted, and the trial court recognized, that the testimony was not offered to prove defendant's character, but rather to show the timeline of events that led up to the firebombing and the motive behind defendant's actions. We agree.

Since the information was contained in the discovery materials and the testimony was offered merely to explain the chain of events that led up to the fire and the motive behind defendant's actions, we conclude that the evidence was offered for a proper purpose. Defendant was not prejudiced by its admission, as the evidence was relevant and offered for a proper purpose. In any event, contradictory evidence was admitted that someone other than defendant fired the weapon into the air. Furthermore, the trial court instructed the jury that testimony of different witnesses may not agree and that they must decide which testimony to accept. We agree with the trial court's ruling that this is an issue of weight and credibility rather than admissibility. For the above reasons, we hold that the trial court did not abuse its discretion in allowing the testimony.

III. JUROR BIAS

Defendant next argues that the trial court erred in failing to inquire into possible juror bias. We disagree.

A. Standard of Review

The trial court's decision whether to conduct a midtrial voir dire examination of a jury is reviewed for an abuse of discretion. *People v Adams*, 245 Mich App 226, 240-241; 627 NW2d 623 (2001), citing *People v Conte*, 104 Mich App 73, 80; 304 NW2d 485 (1981), aff'd on other grounds 421 Mich 704 (1984).

B. Analysis

The United States and Michigan Constitutions guarantee a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. "It is important for trial courts to safeguard a defendant's right to a fair trial before an impartial jury." *People v Johnson*, 103 Mich App 825, 829; 303 NW2d 908 (1981), refused to follow on other grounds 228 Mich App 1 (1998). MCR 6.414(A) provides, in relevant part, that "[t]he trial court must control the proceedings during trial . . . [and] take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court." However, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. It is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it." *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997). "[W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998). Lack of actual bias or prejudice is a matter for the trial judge's determination. *Johnson, supra* at 830.

On the second day of trial, one of the jurors submitted a note to the trial court regarding defendant's intimidating stares toward the jury. The trial court read the note to both the prosecution and the defense and decided not to address the note in front of the jury. Instead, the trial court left it up to defense counsel, as a matter of trial strategy, on how to instruct defendant regarding his body language during the trial. Defense counsel then expressed concern that the juror who submitted the note may be intimidated by defendant and requested that the court inquire regarding whether the juror could remain fair and impartial. The trial court refused, reasoning that the juror indicated she could be fair and impartial before the trial began and that there was nothing in the note to indicate she could no longer do so. It further reasoned that if defendant did cause the jury to feel intimidated, he chose to do so himself.

This Court has previously held, "[w]e will not condone or allow a defendant to perpetrate chaos at his own trial and then obtain a mistrial on the basis of prejudice." *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988); see also *People v Staffney*, 187 Mich App 660, 667; 468 NW2d 238 (1990). While we recognize that defendant's actions in this case may not have amounted to "chaos," it nonetheless perpetrated intimidation for which he should not now be

allowed to use as a basis of finding prejudice. Since the juror initially indicated that she could be fair and impartial, and defendant chose to glare at the jury during his trial, we conclude that the trial court did not abuse its discretion in failing to stop the proceedings in order to conduct a midtrial voir dire to determine whether defendant himself caused the jury to be biased. Furthermore, a finding of prejudice or bias is a matter for the trial judge's determination, *Johnson, supra* at 830, and the trial judge found that there was no indication of bias or prejudice.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper