STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 2, 2004
v	No. 249828 Isabella Circuit Court
CHARLES RALSTON, Defendant-Appellant.	LC No. 02-000882-FC

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of forty-five to seventy years for each of the assault convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant's convictions arise from a shootout with police officers in Isabella County on November 22, 2002. While defendant was incarcerated in the county jail following the shootings, he made statements in tape-recorded conversations that linked him to an unsolved murder in Lapeer County. These recordings were played for the jury at defendant's trial involving the assault charges arising from the police shootout.

The earlier incident involved the October 29, 2002, robbery of a gun shop in Lapeer County, wherein forty handguns and one to four long guns were stolen. The perpetrators shot the proprietors of the gun shop, one of whom died from his wounds. The perpetrators remained at large as of November 22, 2002.

On November 22, 2002, law enforcement officers pulled over a van that matched the description of a vehicle associated with recent break-ins and which bore the wrong license plate. The officers arrested the driver, Jeremy Powell, and a female passenger on outstanding warrants. Two officers entered the van to search it, unaware that defendant was hiding behind the rear bench seat. The officers discussed opening the rear end of the van when defendant suddenly appeared from behind the seat, pointed a gun at an officer, and shouted, "freeze motherf****r." The officers left the van to take defensive positions. Defendant defied police commands and

started to leave the van with his gun pointed toward one of the officers. An officer fired at defendant, defendant fired back, and all three officers returned fire. None of the officers were hit.

Defendant fled in the van, with officers in pursuit, but they lost sight of the van in a wooded area. Defendant was found later that morning in an abandoned trailer. He was wounded in the back. The gun he used to fire at the officers was recovered from underneath the sink in the trailer. The gun had been stolen from the Lapeer County gun shop. Additionally, the police found two empty handgun boxes in Powell's van showing serial numbers that corresponded to guns stolen from the Lapeer County gun shop.

While defendant was incarcerated in the county jail, the police monitored and recorded his telephone calls and visits, including a visit with his father, two phone calls with his father, a visit call with his mother, and a phone call with an unidentified female. In these recorded conversations, defendant acknowledged that he shot at the three officers in the Isabella County traffic stop. He also made statements that linked him to the Lapeer County gun shop shootings and robbery. He expressed anxiety about the whereabouts of a Highpoint rifle, which was believed to be the weapon used in the Lapeer County shootings. He also discussed plans he had made to acquire a grenade launcher and rob banks, and he made statements describing himself as evil and without respect for other persons. Defendant mentioned two other persons, "Jeremy" and "Herman," who had been involved in the Lapeer County shootings; the former, Jeremy Powell, was arrested during the Isabella County traffic stop. Nancy Stimson, a detective-sergeant with the Lapeer County Sheriff's Department, used these statements to charge defendant with homicide and robbery in Lapeer County. Defendant had not been tried for the Lapeer County offenses at the time of his trial in this case.

In a pretrial motion under MRE 404(b), the prosecutor in this case sought to use the recorded conversations as evidence, and also to call Stimson as a witness to explain how defendant's statements related to the Lapeer County offenses. The prosecutor maintained that this evidence was relevant to show that defendant intended to kill the officers during the shootout to prevent them from arresting him and discovering that his gun was stolen in the Lapeer County robbery. Defendant opposed the motion, arguing that the evidence was minimally probative and unduly prejudicial because the prosecutor's motive theory was too speculative and attenuated.[1] The trial court allowed the evidence and permitted Stimson's testimony.

Defendant subsequently moved to limit what portions of the recorded conversations could be introduced. He sought to exclude statements he made about becoming evil, but did not specify which other portions should be excluded, although he referenced "certain statements against interest" and "certain irrelevant and other potentially inflammatory materials," and he moved to redact statements from the recordings that did not prove motive, intent, plan or scheme, or his involvement in the Isabella County shootings. The trial court denied the motion.

[1] At trial, defendant emphasized that he did not fire until the officers fired at him, to argue that he did not shoot with an intent to kill.

II

Defendant raises several challenges to the admissibility of his recorded conversations and Stimson's explanatory testimony. Defendant claims that the trial court erred in admitting the portions of his conversations in which he discussed how he had become evil and in which he discussed his plan to "wreak havoc" on banks and acquire a grenade launcher. He also challenges Stimson's testimony opining that he was responsible for a murder and attempted murder in the Lapeer County robbery. Defendant preserved his challenge to the statements about becoming evil by objecting to this evidence below in a motion in limine, but he did not object to the statements referring to a grenade launcher or object to Stimson's testimony. Consequently, these latter matters are unpreserved.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *Id*. We review unpreserved issues for plain error affecting substantial rights. *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001).

To convict defendant of assault with intent to commit murder, the prosecutor was required to prove: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing a murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); MCL 750.83. The intent to kill may be inferred from minimal circumstantial evidence. *McRunels*, *supra*. Assault with intent to commit murder is a specific intent crime. See *People v Rockwell*, 188 Mich App 405, 410; 470 NW2d 673 (1991).

The prosecutor argued below that evidence of defendant's motive to avoid being caught with evidence of the Lapeer County crime was probative of his intent to kill the officers. Defendant concedes that certain statements connecting him to the Lapeer County homicide and the Highpoint rifle were relevant to the issue of his intent, but argues that his recorded conversations contained other statements that had little probative value, if any, and which were highly prejudicial.

MRE 404(a) provides that evidence of "a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Similarly, MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence may be admitted "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)(1). Other acts evidence is admissible under MRE 404(b) if it is offered for a proper purpose, is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998).

Regarding defendant's statements about becoming evil and mean, and losing respect for people, the trial court agreed with the prosecutor that the statements were relevant to show that defendant intended to kill the officers because they showed that he intended to use any means

necessary to avoid getting caught with evidence of the Lapeer County homicide. However, there is no reference in either conversation to suggest that defendant was referring to his state of mind at the time of the shooting. It appears, instead, that he was generally discussing how he had become so immersed in criminal activity. We agree with defendant that the only nexus between the statements and defendant's intent at the time of the Isabella County shooting was the inference that defendant intended to kill the officers because he was an evil person and indifferent to other persons' rights. In this context, the statements were improper character evidence under MRE 404(a), because their purpose was to show that defendant was an evil person who acted in conformity with his evil character at the time of the Isabella County shooting. Furthermore, because the statements pertained only to defendant's *character*, as opposed to his prior *acts* or *conduct*, the statements were not eligible for admission under MRE 404(b). *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002).

However, an error in the admission of evidence is not a ground for reversal unless it is more probable than not that the error affected the outcome of the trial in light of the weight and strength of the untainted evidence. MCR 2.613(A); MCL 769.26; *McLaughlin*, *supra* at 650. Here, the evidence of defendant's assessment of himself as a person who was evil, mean, and disrespectful of others was effectively cumulative of other properly admitted evidence—including defendant's own tacit admissions—establishing that he was involved in two separate shooting incidents, involving five victims, and that one of the shootings was committed in order to steal more than forty guns for the purpose of future criminal conduct. Considered in the context of this other evidence, it is not more probable than not that defendant's statements referring to his evil character affected the outcome. Therefore, any error was harmless.

Defendant did not challenge below his statements about acquiring a grenade launcher and his plan to "wreak havoc." Therefore, we review these statements for plain error. We conclude that the statements were relevant to the issue of defendant's intent, MRE 401, because defendant explained that he wanted a grenade launcher "so no one can come and get me." This statement revealed that defendant had formulated an intent and plan, even before the Isabella County shooting, to use deadly force to resist arrest. Unlike defendant's general statements about becoming evil, which pertained to character instead of conduct, the statement about ordering a grenade launcher revealed concrete preparation to use deadly force against law enforcement officers. Also, defendant's statement about a plan to "wreak havoc" on "banks and stuff" was relevant to provide context to the statement about the grenade launcher, i.e., it gave context to defendant's plan to use a grenade launcher to resist arrest. The statements were therefore admissible under MRE 404(b) for the nonpropensity purposes of proving intent and motive. *Werner, supra* at 538. We disagree with defendant that the evidence was unduly prejudicial under MRE 403. Defendant's intent was the primary disputed issue at trial. Consequently, it is not apparent that the prejudicial effect of the statements substantially outweighed the probative value. Thus, defendant has not shown that the statements amounted to plain error.

Defendant also argues that Stimson improperly expressed her opinion that he committed a murder and attempted murder in the Lapeer County robbery. Because defendant failed to object to Stimson's testimony, we review this issue for plain error affecting defendant's substantial rights. *Herndon, supra*.

Although Stimson twice used the term "attempted murder" in relation to the Lapeer County shootings, she did so primarily in a lay context, not for the purpose of expressing an

opinion about whether a legal mens rea requirement for murder was satisfied. Stimson did not express any opinion about defendant's guilt with respect to the charged offenses. Further, although Stimson opined that defendant was involved in the Lapeer County gun shop robbery and shooting, she did not state that he was the shooter. Also, Stimson's opinion that defendant was involved in the Lapeer County robbery was cumulative to defendant's own statements tacitly admitting his involvement. For these reasons, defendant has failed to establish that Stimson's testimony resulted in a plain error that affected his substantial rights.

III

Defendant raises a claim of prosecutorial misconduct, based on the prosecutor's argument that defendant's intent to kill the officers could be inferred from his evil character. In closing argument, the prosecutor attempted to discount the defense claim that there was no evidence of an intent to kill. The prosecutor remarked:

> You listen to the tape, the tape where he's talking to this unknown female. You listen to the tape where he's talking, I believe, to his mother; and what does he tell us about himself? He tells us that just before this he could feel himself becoming evil, that he had no regard for human life. Is there any evidence before you that would seem to suggest that that had changed? That I'm going to reek [sic] havoc. I don't care about me; I don't care about anyone else; nobody is going to take me; I've got grenade launchers coming; the only way you kill a cop is to put a bullet in him. But for this one little instance [at the scene of the Isabella shooting] I become concerned about people. I worry about he [sic] welfare of my fellow man. All I want to do is get out of there, but I would never think of harming them. Is that reasonable? Is that reasonable, ladies and gentlemen? No. No, that is not. The element of intent, ladies and gentlemen, is one that can be formed at any time. One that can be formed at any time.

The prosecutor then argued that even if defendant had not intended to kill the officers when the incident began, he subsequently formed that intent immediately before he began shooting.

Generally, a prosecutor's remarks are examined on a case by case basis, in context, to determine whether the defendant was denied a fair and impartial trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). But because defendant failed to object to the prosecutor's remarks at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Rodriguez,* 251 Mich App 10, 32; 650 NW2d 96 (2002).

We agree that the prosecutor's statement asked the jury to make the improper inference that defendant acted with an intent to kill because that was consistent with his evil character. However, we cannot conclude that this remark denied defendant a fair trial. The prosecutor did not focus solely on a character argument in arguing the issue of defendant's intent. Rather, he also properly referred to other evidence and the circumstances as demonstrating that it was simply implausible that defendant acted with other than a deadly intent. Defendant does not

claim that the prosecutor made any other improper remarks in the argument.[2] Therefore, defendant has failed to establish that his substantial rights were affected.

IV

Defendant lastly argues that trial counsel was ineffective for failing to object to the admission of improper evidence. Defendant does not specify what objections counsel should have made, but he seems to argue that counsel should have raised specific objections in addition to generally opposing Stimson's testimony and his recorded conversations. Because defendant did not move for a new trial or a *Ginther*[3] hearing, our review of this issue is limited to mistakes apparent on the record. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004).

To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant has not established either prong of this test. As discussed above, defendant's statement about acquiring a grenade launcher was admissible because it was relevant to the prosecutor's theory that defendant planned to use deadly force to resist arrest. Consequently, defense counsel did not err in failing to specifically object to this evidence. Stimson's uses of the terms "murder" and "attempted murder" in reference to the Lapeer County shooting, considered in context, were not intended as a comment on defendant's specific state of mind during that incident. Under the circumstances, counsel's failure to object may have been trial strategy and defendant has not overcome the presumption of sound strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Accordingly, we reject defendant's claim that trial counsel was ineffective.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood

[2] Defendant's reliance on *Washington v Hofbauer*, 228 F3d 689, 696-697 (CA 6, 2000), is misplaced because in that case there was extensive inappropriate conduct, unlike the brief digression from otherwise proper argument that occurred in the present case.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).