STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2008
v	No. 270880 Oakland Circuit Court
KETJOL MANOKU, Defendant-Appellant.	LC No. 2004-197899-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of conspiracy to commit first-degree murder, MCL 750.316(1)(a), 750.157a, first-degree premeditated murder, MCL 750.316(1)(a), four counts of assault with intent to commit murder, MCL 750.83, and six counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm, but remand for the ministerial task of correcting the judgment of sentence.

The incident giving rise to defendant's convictions is apparently the culmination of a rivalry between two groups of Albanian men that resulted in defendant opening fire at a minivan holding five members of the rival group after the minivan drove into a parking lot in the late night hours of July 17, 2004, where defendant and his codefendants were standing. Four of the minivan passengers were stuck by bullets, one fatally, as the minivan was attempting to leave the parking lot. Over the preceding couple of days, defendant, his codefendants, and others had met together on several occasions to watch and follow members of this same group of men, as well as to discuss and plan violent action against them.

On appeal, defendant first argues that evidence of other bad acts was improperly admitted as MRE 404(b) evidence because the evidence only tended to show defendant's propensity to engage in criminal activity. We disagree. We review the trial court's decision for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The evidence defendant claims was inadmissible was testimony related to his purported actions before the shooting against two men who were friends with members of the rival group. In the first incident, which occurred in June of 2004, defendant and his codefendant, Edmond Zoica, confronted Kutjim Karapici after a fist fight between Karapici and defendant's friend,

Drini Brahimilari. Defendant was alleged to have called a meeting with Karapici at which meeting Zoica pulled a knife and pointed it at Karapici. Defendant pulled a gun, pointed it at Karapici, and fired, but Karapici was not struck by a bullet. In early July of 2004, defendant again called a meeting with Karapici, at which meeting defendant and his codefendant, Oliger Merko, led him past a table full of knives into a plastic-covered room and told him to kneel. Merko placed a pillow and gun to his head and threatened to kill him because of the disrespect Karapici showed their friend Brahimilari. Karapici pleaded for his life and agreed to pay a sum of money in exchange for his release. Defendant's codefendants and others were involved in this first incident. In the second incident, defendant confronted Arian Gashi on July 4, 2004, at the Tirana Café by pointing a gun at Gashi's chest and threatening to kill him because of disrespect showed defendant.

MRE 404(b) is inclusionary rather than exclusionary. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id*. at 65. Therefore, to be admissible under MRE 404(b), generally bad acts evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, *supra* at 74-75.

The prosecution sought admission of the disputed testimony for the purpose of proving defendant's intent, preparation, knowledge, opportunity, or absence of mistake. MRE 404(b). On appeal, the prosecution also argues that the disputed testimony was also admissible to establish motive. See *People v Sabin (After Remand)*, 463 Mich 43, 59 n 6; 614 NW2d 888 (2000) ("The prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence.") Clearly, these are proper purposes for the admission of the disputed testimony. See *Knox*, *supra*.

Defendant argues that even if the other acts evidence was offered for a proper purpose, it was irrelevant under the prosecution's theories because it involved actions against other people and could not prove conspiratorial intent. See *Sabin (After Remand)*, *supra*. Evidence is considered "relevant" if it makes the existence of any fact at issue more or less probable. *VanderVliet*, *supra* at 62, quoting MRE 401. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *VanderVliet*, *supra* at 75.

The charges against defendant included first-degree premeditated murder, which required the prosecution to establish that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Intent may be inferred from all of the facts and circumstances surrounding the crime. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). Prior planning denotes premeditation and deliberation. *People v Hammond*, 187 Mich App 105, 108; 466 NW2d 335 (1991), quoting *People v Hamp*, 110 Mich App 92, 103; 312 NW2d 175 (1981). Defendant was also charged with conspiracy to commit first-degree premeditated murder, thus the prosecution had to establish that defendant intended to combine with two or more persons to accomplish first-degree murder. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). "For intent to exist, the defendant must know of the

conspiracy, must know of the objective of the conspiracy, and must intend to participate cooperatively to further that objective." *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993). Defendant was also charged with assault with intent to kill, requiring the prosecution to prove an assault with an actual intent to kill that, if successful, would have made the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). And, defendant was charged with felony firearm, thus the prosecution had to establish that defendant possessed a firearm while committing a felony. MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Defendant asserted a claim of self-defense.

The prosecution argued that the other acts evidence was relevant under its theories because the evidence demonstrated that this defendant and his codefendants (1) had recently engaged in prior conspiracies to commit crimes together against members or friends of the rival group and thus tended to establish that defendant had knowledge of the final conspiracy and intended to participate in it, (2) had actually accomplished the criminal objectives of these prior conspiracies which tended to establish defendant's intent to commit the charged crimes, (3) had used handguns to accomplish their criminal purposes which tended to establish defendant's intent to commit the charged crimes, as well as the manner in which the charged crimes were committed, (4) had threatened to kill their previous victims which tended to establish defendant's intent to kill, (5) had targeted other Albanian males who were friends with or members of the rival group which tended to establish a motive for defendant's actions and defendant's intent to commit the charged crimes, and (6) had been the aggressors in those confrontations which tended to negate defendant's self-defense theory.

Considering the disputed evidence and its relationship to the elements of the charges, theories of admissibility, and defense asserted, we agree with the trial court and conclude that the evidence was relevant—it tended to make the existence of facts at issue more or less probable. Briefly, both prior incidents recently preceded the shooting and (1) involved members or friends of the rival group who were in the minivan during the shooting, (2) were instigated by defendant and his codefendants, (3) involved defendant pulling a handgun and aiming it at a victim, (4) included threats of death, and (5) arose out of purported disrespect shown for defendant or his friend. The evidence revealed the animosity between the rival groups and the escalation of that rivalry, creating a context for the shooting and providing a motive for the shooting. See *People v Hoffman*, 225 Mich App 103, 106-110; 570 NW2d 146 (1997). The evidence was also relevant: (1) to establish defendant's intent to kill, which was the culmination of threats to kill members or friends of the rival group using a handgun—acts of the same general category, see *VanderVliet*, *supra* at 80; (2) to the issue of the conspiracy's existence arising from this escalating rivalry that involved prior agreements to act in a violent manner against members or friends of the rival group; (3) to the issue of defendant's knowledge of the conspiracy, including the objective to kill members or friends of the rival group and defendant's intent to participate cooperatively to further that objective; and (4) to defendant's claim of self-defense, demonstrating that defendant was the aggressor in prior confrontations with members or friends of the rival group.

Defendant next claims that, even if the evidence was offered for a proper purpose and was relevant, it should have been excluded because its probative value was substantially outweighed by its potential for unfair prejudice. Defendant argues that "[t]he probative force of this evidence . . . is weak because it involved alleged acts against other individuals that had nothing to do with the specific context of the encounter on the night of the shooting." For the

reasons discussed above, we disagree. Although the challenged evidence was damaging to defendant's case, the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. See *VanderVliet*, *supra* at 75. In summary, the trial court did not abuse its discretion in admitting the evidence, and defendant was not denied a fair trial because the evidence was admitted.

Next, defendant argues that he was denied his right to present a defense to a properly instructed jury because the trial court denied his request for a self-defense instruction. We disagree. We review issues of law concerning jury instructions de novo and the trial court's determination whether a particular instruction is applicable to the facts for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A defendant has a right to a properly instructed jury thus a requested instruction must be given if the evidence supports it. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). But, an instruction not supported by the evidence should not be given. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). To prove self-defense in support of a claim of justifiable homicide, the evidence must establish that (1) the defendant honestly and reasonably believed he was in danger, (2) the danger feared was death or serious bodily harm, (3) the action taken appeared at the time to be immediately necessary, and (4) the defendant was not the initial aggressor. *People v Riddle*, 467 Mich 116, 119, 120 n 8; 649 NW2d 30 (2002).

Here, the trial court refused to give a self-defense instruction on the grounds that defendant approached the minivan, he was the initial aggressor, and the minivan was pulling away, out of the parking lot, before the shots were fired. That decision did not constitute an abuse of discretion. The evidence included that the minivan drove slowly into the parking lot with its headlights on, defendant and codefendant Merko approached the minivan, defendant pulled a handgun out, racked it, and began shooting at close range. The medical examiner testified that Markiol Jaku, who was killed in the shooting, had stippling injuries to the left side of his face which was consistent with a shot being fired at close range while Jaku was seated in the driver's seat with his arms extended forward toward the steering wheel. There was no evidence of any arguing or threatening behavior preceding the shooting. There was no evidence that the people in the minivan pointed or fired a gun at defendant and, in fact, they did not even return fire in response to the shooting. And, even as the minivan was accelerating out of the parking lot, defendant continued shooting directly at the minivan, striking the victims. The elements of self-defense are wholly lacking; thus, the trial court's denial of defendant's request for a self-defense instruction was proper.

Next, defendant argues that he was denied the effective assistance of counsel because his attorney unreasonably advised him not to testify on his own behalf thus depriving him of the opportunity to establish his self-defense claim with his own testimony. Because this issue was not preserved, our review is for mistakes apparent from the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). First, we note that defendant testified under oath that he knew he had constitutional rights to testify on his own behalf and it was his independent decision—and solely his decision—not to testify; thus, this intentional relinquishment of a known right constitutes waiver extinguishing the error. See *People v Cleveland Williams*, 475 Mich 245, 260-261; 716 NW2d 208 (2006). Nevertheless, the issue is without merit.

To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Sabin (On Second Remand)*, *supra* at 659. In showing that counsel's representation was deficient, a defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994).

Defendant claims that he would have testified that he saw that the people in the minivan "were dressed for a drive-by shooting" and had guns before he starting shooting in self-defense. But, a coconspirator, Florjon Carcani, testified that after the shooting codefendant Merko said he saw an assault rifle in the minivan. And Arjan Malushi testified that after the shooting, codefendant Zoica went to Malushi's house and told him that they did not expect the rival group to show up that night and when they arrived, the rival group had on black clothing, black hats, black masks, and sunglasses. Zoica also told Malushi that he had seen an assault rifle in the minivan. Therefore, evidence in support of defendant's claim of "self-defense" was before the jury without the risks associated with cross-examination. We will not second-guess defendant's counsel's trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). And, even with defendant's purported testimony, a self-defense instruction would not be warranted. Further, defendant has failed to establish that, if he had testified, there is a reasonable probability that the result of the proceeding would have been different.

Next, defendant claims that his sentence of life without parole for the conspiracy to commit first-degree murder conviction constituted plain error because it is a parolable offense. Citing MCL 791.234(6) and *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989), the prosecution agrees. Therefore, the matter is remanded for correction of the judgment of sentence in this regard. And, defendant's claim that he was entitled to a restitution hearing was resolved by this Court's order of remand for such hearing. *People v Manoku*, unpublished order of the Court of Appeals, issued August 29, 2007 (Docket No. 270880).

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra