STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2010
v	No. 293013 Oakland Circuit Court
DARNELL DUNLAP, Defendant-Appellant.	LC No. 2008-223861-FC

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree murder, 750.317. The trial court sentenced him, as a third-offense habitual offender, MCL 769.11, to 25 to 40 years in prison. We affirm.

Defendant's conviction arose from the stabbing death of Marlowe Noland on the evening of October 26, 2008. At trial, defendant claimed that he "poked" Noland with a knife because Noland was crushing him and that he killed Noland accidentally.

Defendant first argues that the trial court erred by allowing the jury to hear that defendant had a conviction for attempted arson of a dwelling house. We disagree. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

During his testimony, defendant said that he was a helpful person, and he stated repeatedly that he would never hurt anyone. After this testimony, the court allowed the prosecutor to ask defendant about his past attempted arson conviction.

Generally, a defendant has the right to know if his testimony will be impeached under MRE 609 before taking the stand. *People v Moore*, 164 Mich App 378, 382-383, 417 NW2d 508 (1987), mod 433 Mich 851 (1987). This rule, however, only applies to evidence that will be used to impeach credibility generally. *Id*. Therefore, when evidence is used to impeach specific testimony, and not credibility generally, MRE 609 is not applicable. Moreover, a defendant, through his testimony, may open the door to his other criminal acts. See, e.g., *People v Lukity*, 460 Mich 484, 498-499; 596 NW2d 607 (1999). In this case, defendant made statements that the prosecution was properly permitted to rebut with evidence of a past conviction. See *id*.; see also *People v Taylor*, 422 Mich 407, 414-419; 373 NW2d 579 (1985).

Moreover, the evidence was not inadmissible under MRE 403. Defendant claims that because the conviction was almost 26 years old, it had no probative value concerning defendant's state of mind when he stabbed Noland. Defendant argues that the error in admitting the evidence was not harmless, because the jury, by initially deadlocking, demonstrated uncertainty about the verdict.

However, "unfair prejudice" under MRE 403 does not mean "damaging." *People v Mills*, 450 Mich 61, 75, 537 NW2d 909 (1995), modified 450 Mich 1212 (1995) (internal citation and quotation marks omitted). Rather, unfair prejudice exists when there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury," or it "would be inequitable to allow the proponent of the evidence to use it." *Id*. at 75-76 (internal citation and quotation marks omitted). The evidence, contrary to defendant's contentions, was highly probative to counter his specific testimony and was not unfairly prejudicial. As the trial court stated, if the evidence were excluded, the jury would be left with a false impression about defendant's background. Also, this evidence was probative and relevant to the case at hand because it countered defense counsel's general strategy. Defense counsel tried to demonstrate that what defendant did was an accident and that defendant is a nice and gentle man incapable of harming another. By introducing the evidence, the prosecution was able to paint a different picture of a specific component of defendant's character, namely, his ability to cause harm to others. This evidence did not show that defendant was generally a bad man, but rather that he tried to hurt people in the past by attempting to set fire to a dwelling.

The trial court did not err in permitting the prosecution to impeach defendant's specific testimony using the past attempted arson conviction.

Defendant next argues that the trial court erred by allowing testimony regarding three specific instances of past bad conduct on the part of defendant. We disagree.

The evidence in question involved witness Michael Bowman, who described three aggressive incidents involving defendant.

Whether evidence is admissible under MRE 404(b) is determined by the four-part test set forth in *People v VanderVliet*, 444 Mich 52, 74-75, 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The Court in *VanderVliet* outlined that the evidence, to be admissible, must be (1) relevant to an issue other than propensity, (2) relevant under MRE 402 to an issue or fact of consequence at trial, (3) probative and not substantially outweighed by unfair prejudice in accordance with MRE 403, and (4) subject to a limiting instruction if such an instruction is requested. *Id*. Further, the Court in *VanderVliet* stated that there is no general rule of exclusion concerning other-acts evidence. *Id*. at 65. MRE 404 is a rule of inclusion because it "permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1989).

In the present case, defendant argues that the first and third prongs of the test set forth above were not satisfied. Defendant claims that the incidents described by Bowman were not probative because (1) he never actually stabbed Bowman in any of the incidents described - in the last incident he did not even have a knife - and (2) these events occurred so long ago that they are no longer relevant. What defendant fails to realize, however, is that even though he did not stab Bowman during the two "knife" incidents, that does not automatically drain them of their

probative value. These events demonstrated defendant's willingness to resort to using a knife during arguments. Further, the fact that Bowman was able to disarm defendant and fight him off before defendant was able to stab him only indicates that Bowman was capable of intervening. While the third incident did not involve a knife, a fact apparently not anticipated by the prosecution, this does not constitute sufficient ground for the reversal of defendant's conviction. In addition to only being mentioned by the prosecution briefly and therefore not likely causing harm to defendant, it also was probative of defendant's absence of mistake in resorting to physical contact for verbal arguments, and probative of how defendant resorts to fighting in an effort to resolve verbal arguments.

Moreover, the length of time that elapsed between the stabbing at issue in this case and the incidents described by Bowman only increased the evidence's probative value. The fact that at least two of the incidents happened before defendant's carjacking, and before another incident that allegedly limited his mobility,[1] indicated that, contrary to defense counsel's general assertion that defendant only carried a knife because he was a traumatized person with limited mobility, he in fact resorted to using knives and employing other physical aggression before these allegedly traumatic events.

The evidence presented by Bowman was highly probative. Moreover, defendant has not provided any meaningful evidence or argument to show how the probative value of the evidence was outweighed by any prejudicial effect. We find that the evidence did not violate any prong of the *VanderVliet* test and was admissible.

Defendant lastly argues, in a supplemental brief, that he received ineffective assistance of counsel because his attorney failed to investigate, and introduce into evidence, prior domestic abuse by Noland against defendant.

In order to prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant has failed to establish ineffective assistance of counsel. As noted in *People v Hoag*, 460 Mich 1, 6, 594 NW2d 57 (1999):

> A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports

[1] This incident occurred ten years before the stabbing in this case. Defendant was burned when he was exposed to steam. Defendant claimed that his allegedly limited mobility, coupled with his carjacking experience, prompted his habit of carrying a knife.

> his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately. [Internal citation and quotation marks omitted.]

Defendant has not adequately set forth a factual predicate for his claim, and therefore reversal is unwarranted.

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio