S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TEMARUS MONTRELL GRICE,

Defendant-Appellant.

UNPUBLISHED
November 28, 2017

No. 334248
Saginaw Circuit Court
LC No. 16-042117-FH

Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of extortion, MCL 750.213.[1] He was sentenced as a third habitual offender, MCL 769.11, to 217 months to 40 years' imprisonment. On appeal, defendant presents two evidentiary challenges. We affirm.

Two female complainants testified that defendant, after purchasing some food for them at McDonald's and stopping to buy alcohol, drove them to defendant's house, where defendant, after being denied sex by one complainant, threatened to injure and kill the complainants, brandished a gun, and physically prevented them from leaving the house, demanding that the complainants first pay him for the food that he had purchased for them. One of the complainants was accompanied by her baby during the episode.

On appeal, defendant first argues that the trial court erred in allowing the complainants to testify that, as part of his threats to get the complainants to pay and keep them detained, defendant stated that he would have no problem killing them because he had just finished doing 12 or 13 years in prison for murder. Defendant argues that the evidence was inadmissible under MRE 403, which provides in relevant part that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Defendant contends that the error was exacerbated by the fact that the prosecutor referenced the challenged

[1] The jury acquitted defendant of assault with a dangerous weapon (felonious assault), MCL 750.82, unlawful imprisonment, MCL 750.349b, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f.

testimony during opening statements and closing arguments. The trial court had denied a pretrial motion in limine filed by defendant, which sought exclusion of the evidence on the basis of MRE 403. The trial court found that the evidence was highly probative with respect to the elements of the charged crimes, increasing the complainants' fear relative to defendant's threats. The prosecution maintains on appeal that the testimony was admissible as part of the res gestae of the offense of extortion.

In *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), the Michigan Supreme Court observed:

> The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion. However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. Accordingly, when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. [Citations omitted.]

We initially note that defendant does not make an argument under MRE 404(b), focusing instead exclusively on MRE 403.[2] "Rule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). And "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.* "In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of 'prejudice' exists." *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995) (citation and quotation marks omitted). "All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible." *Id.* at 75. "Unfairness might not exist where . . . the critical evidence supporting a party's position on a key issue raises the danger of prejudice within the meaning of MRE 403 . . . but the proponent of this evidence has no less prejudicial means by which the substance of this evidence can be admitted." *Id.* at 76 (citation and quotation marks omitted). "[T]he prosecution may offer all relevant evidence, subject to MRE 403, on every element [of an offense]," given that the elements of an "offense are always at issue." *Id.* at 71.

The trial court did not err in admitting the testimony concerning defendant's threats that he was not afraid to murder the complainants in light of the fact that he had previously served 12

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[2] Our Supreme Court has held that there is no "res gestae exception" to MRE 404(b); however, other-acts evidence characterized as "res gestae" may still be admissible if introduced for a specific, non-propensity purpose in accordance with MRE 404(b). *People v Jackson*, 498 Mich 246, 274-275 and n 11; 869 NW2d 253 (2015). To the extent that MRE 404(b) is even implicated in the context of introducing a *statement* made by defendant, the evidence was introduced for non-propensity purposes as reflected below.

or 13 years in prison. The complainants indicated that this particular threat heightened and intensified their fear of being harmed and killed by defendant. For purposes of the extortion charge, the prosecution had to prove that defendant made threats of injury and made them willfully with the intent to obtain money from the complainants. MCL 750.213; M Crim JI 21.1. With respect to establishing threats of injury, part of the very threats themselves necessarily included defendant's mention that he had previously committed murder and served time, suggesting to the complainants that he would not hesitate to kill them. Defendant argues that simply having the complainants testify that he threatened to kill them would have sufficed, absent a need to make known to the jury that defendant did prison time and did it for murder, which was unacceptably and unfairly prejudicial. Defendant essentially wants us to sanitize his threats, keeping the jury in the dark in regard to the actual and accurate nature of the threats. The prosecution did not have a less prejudicial means by which the true substance of the threats could be admitted. Also, with respect to the intent element of extortion, the challenged testimony bolstered the prosecution's assertion that defendant's threats were serious and that he truly intended to obtain money as a result of the threats.

Moreover, although defendant was eventually acquitted of additional crimes, the elements of those offenses were still in play when the complainants gave their testimony. For purposes of the felonious assault charge, the elements could be established by proving, in part, that defendant committed an act that would have caused a reasonable person to fear or apprehend an immediate battery and that defendant intended to make the complainants reasonably fear an immediate battery. MCL 750.82; M Crim JI 17.9. The testimony at issue was probative on these matters. Hearing that defendant had previously committed murder and did time for the murder certainly would have caused a reasonable person to be more fearful of a battery; the evidence was very probative on this aspect of the felonious assault charge. The testimony was also relevant to showing that defendant was knowingly attempting to restrain the complainants relative to the charge of unlawful imprisonment. MCL 750.349b; *People v Bosca*, 310 Mich App 1, 18; 871 NW2d 307 (2015).

While the testimony was prejudicial to defendant, as is typically intended, we cannot conclude that the probative value of the evidence in connection with the elements of the charged offenses was substantially outweighed by the danger of unfair prejudice. We struggle to see how the challenged evidence was given undue or preemptive weight by the jury, considering that the jury acquitted defendant on all the charges, except for extortion. The trial court did not abuse its discretion in admitting the testimony in dispute.

Defendant next argues that the trial court erred in permitting one of the complainants to answer a juror's question regarding what the complainant thought defendant had meant when he expressed that he would have no problem taking care of the complainant's baby. The complainant replied, "I ain't think he was going to take care of her for real. He was probably going to do something else to her." We find no plain error affecting defendant's substantial rights on this unpreserved issue. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011). Even absent the question by the juror and complainant's response, most jurors likely inferred, reasonably so, that defendant's statement threatened harm to the baby. We highly doubt that the jurors viewed defendant's statement as a genuine gesture to give care and comfort to the baby. Moreover, as one of defendant's alleged threats, i.e., harming the baby, whether the

complainant actually took defendant’s statement as a threat or not was relevant to the charged offenses. Further, the requisite prejudice has simply not been shown, even assuming error.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kirsten Frank Kelly