STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2024 11:34 AM
v	No. 364688 Wayne Circuit Court
STEVEN JAMES, Defendant-Appellant.	LC No. 21-009090-01-FC

Before: JANSEN, P.J., and RICK and PATEL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and two counts of carrying a firearm during the commission of a felony (felony-firearm) (second offense), MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 5 to 20 years' imprisonment for AWIGBH, one to five years' imprisonment for felon-in-possession, and five years' imprisonment for his two felony-firearm convictions. We affirm.

I. BACKGROUND

Defendant's convictions arise from a shooting involving his brother. The victim testified that the brothers began arguing when defendant refused to leave the victim's home. During the argument, defendant punched the victim in the neck. Subsequently, the two engaged in a physical fight for 10 to 15 minutes. Near the end of the fight, defendant pulled out a gun and shot the victim twice in his left leg. The victim grabbed defendant's arm in an attempt to prevent defendant from shooting him again, but defendant kept firing the gun. The victim eventually kicked defendant off of him and ran out of the house. In total, defendant shot the victim four times: twice in the victim's left thigh, once in his left buttock, and once in the back of his head. The victim did not know when he sustained the injuries to the buttock and head. The victim testified that he did not know that defendant was armed until defendant fired the first shot. The victim testified that he did not have a gun or other weapon, and that he never gained control of the gun that was in defendant's hand.

The defense theory at trial was that the victim was the aggressor and introduced the gun to the fight. Defendant testified that the verbal altercation turned physical when the victim struck defendant's face with a gun at least four times. Defendant tried to grab the gun from the victim. The victim threw defendant on the couch. Defendant denied throwing any punches, stating he was focused on trying to get the gun from the victim. While defendant and the victim fought over the gun, the gun fired and the bullet struck defendant in the knee. After defendant wrestled the gun from the victim, the victim punched and kicked defendant while standing over him. Defendant begged the victim to stop kicking him. As the victim continued to kick defendant, defendant shot the victim in his left leg. Defendant eventually kicked the victim off of him, they both fell to the floor, and the victim ran outside. Defendant denied shooting the victim as he ran away. He explained that he fired the gun as he and the victim fell to the floor, and surmised that the gunshot injuries to back of the victim's head and buttocks occurred when they fell to the floor. Defendant testified that he did not want to harm the victim. Defendant denied that the gun belonged to him or that he brought the gun to home. He claimed he had never seen the gun before that day.

The victim's neighbor testified that she was inside her home when she heard gunshots. She looked out her door and saw the victim run from his home, fall from the front porch, and collapse onto the driveway. The victim exclaimed that his brother had shot him. The neighbor testified that defendant stood over the victim saying, "get up . . . ain't nothin' wrong with you." According to the neighbor, defendant grabbed the victim's pants pockets, and kept trying to pull him up while telling the victim that there was nothing wrong with him.

The police recovered five fired shell casings in the living room, two unfired bullets in the living room and driveway, and a loaded firearm magazine on the lawn. There was also evidence of multiple bullet holes in the walls and surrounding surfaces inside of the home. A handgun was recovered from the kitchen. The spent shell casings matching the recovered gun.

The jury rejected defendant's self-defense claim and found defendant guilty of AWIGBH, felon-in-possession, and two counts of felony-firearm. Defendant was sentenced as indicated. Defendant now appeals.

II. SUFFICIENCY OF EVIDENCE

Defendant first argues that there was insufficient evidence to convict him of AWIGBH because he was acting in self-defense. We disagree.

"Challenges to the sufficiency of the evidence are reviewed de novo." *People v Xun Wang*, 505 Mich 239, 251; 952 NW2d 334 (2020). "In reviewing the sufficiency of the evidence, this Court must view the evidence—whether direct or circumstantial—in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Kenny*, 332 Mich App 394, 402-403; 956 NW2d 562 (2020). "[A] reviewing court is *required* to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018) (cleaned up). "It is for the trier of fact, *not the appellate court*, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.* (cleaned up).

"Due process requires the prosecution to prove every element beyond a reasonable doubt." *People v Smith*, 336 Mich App 297, 308; 970 NW2d 450 (2021) (cleaned up). "The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012) (cleaned up). "AWIGBH is a specific intent crime." *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014). "Intent to cause serious harm can be inferred from the defendant's actions, including the use of a dangerous weapon or the making of threats." *Id*. at 629. "[I]njuries suffered by the victim may also be indicative of a defendant's intent." *Id*.

Defendant does not challenge the sufficiency of the evidence regarding the assault or his intent to do great bodily harm. Instead, he contends that the prosecution failed to present sufficient evidence to disprove his self-defense theory. The Self-Defense Act, MCL 780.971 *et seq*., provides:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual. [MCL 780.972(1).]

"A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions." *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). "In general, a defendant does not act in justifiable self-defense when he or she uses excessive force or when the defendant is the initial aggressor." *People v Guajardo*, 300 Mich App 26, 35; 832 NW2d 409 (2013). See also *People v Leffew*, 508 Mich 625, 654; 975 NW2d 896 (2022) (noting that "a defendant cannot assert the affirmative defenses of self-defense or defense of others if they are the initial aggressor"). "[O]nce a defendant satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of disproving the affirmative defense of self-defense beyond a reasonable doubt." *People v Rajput*, 505 Mich 7, 11; 949 NW2d 32 (2020) (cleaned up).

In this case, defendant and the victim offered contradictory versions of events. The victim testified that defendant was the initial aggressor when he punched the victim in the neck. The victim stated that defendant pulled out a gun and shot the victim four times during a physical altercation. Defendant testified that the victim was the initial aggressor, the victim produced the gun, defendant was afraid he was going to get seriously hurt while he was fighting with the victim, and defendant only shot the victim in his leg to get the victim to stop kicking him. The jury clearly discredited defendant's testimony in support of his self-defense theory. Instead, the jury determined that the evidence and testimony was credible to convict defendant of AWIGBH. We will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *People v Ortiz*, 249 Mich App 297, 300-301; 642 NW2d 417 (2001). Applying these standards, there was sufficient evidence to enable the jury to find beyond a reasonable doubt that defendant was guilty of AWIGBH. We will not disturb that determination.

III. FAIR TRIAL

Defendant also argues that he was denied his constitutional right to a fair trial because defense counsel announced that defendant was a felon during opening statements.

The United States and Michigan Constitutions afford criminal defendants the right to effective assistance of counsel. *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023), citing Const 1963, art 1, § 20; US Const Am VI; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). An ineffective-assistance-of-counsel claim presents a "mixed question of fact and constitutional law." *Yeager*, 511 Mich at 487. Generally, we review de novo constitutional questions, while we review the trial court's findings of fact for clear error. *Id*. To preserve a claim of ineffective assistance of counsel, a defendant must raise the issue in a motion for a new trial or a *Ginther*[1] evidentiary hearing filed in the trial court, *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012), or in a motion to remand for a *Ginther* hearing filed in this Court, *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020). Defendant did none of these things and thus our review of this unpreserved issue is limited to errors apparent on the record. *Abcumby-Blair*, 335 Mich App at 227.

To prevail on a claim of ineffective assistance, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that [the] outcome would have been different." *Yeager*, 511 Mich at 488 (cleaned up).[2] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (cleaned up). "Under the objective-reasonableness prong of the *Strickland* test, there is a presumption that counsel was effective, and a defendant must overcome the strong presumption that counsel's challenged actions were sound trial strategy." *Abcumby-Blair*, 335 Mich App at 236-237 (cleaned up). We will not second-guess matters of trial strategy or "assess counsel's competence with the benefit of hindsight." *Id*. at 237 (cleaned up).

Defendant argues that he was denied his constitutional right to a fair trial because his trial attorney announced during his opening statement that both defendant and the victim were felons. In an apparent effort to discredit the victim's anticipated testimony, defense counsel stated, "[I]t's clear that these two gentlemen were brothers. Neither one's saints. Both of them are felons." The prosecutor objected to the statement. Outside the presence of the jury, the trial court admonished defense counsel for revealing that the victim was a felon. Defense counsel conceded that he erred and that a curative instruction was necessary. The trial court instructed the jury that it was not to

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

[2] Defendant relies on the sham-trial test to support his argument. See *People v Degraffenreid*, 19 Mich App 702, 716-718; 173 NW2d 317 (1969) (explaining that the sham-trial test is a common-law standard for evaluating ineffective-assistance-of-counsel claims that does not involve the constitutional right to effective assistance of counsel). But our Supreme Court disposed of the sham-trial test as a common-law alternative to ineffective-assistance-of-counsel claims when it adopted the *Strickland* standard for claims of ineffective assistance of counsel. *People v Pickens*, 446 Mich 298, 319; 521 NW2d 797 (1994).

consider defense counsel's statement about the victim's criminal record because opening statements are not evidence.

Although defense counsel erred by stating that the victim was a felon, defendant cannot establish that counsel rendered deficient performance by stating that defendant was a felon. Defendant's felon status was a necessary element of the felon-in-possession charge. During the prosecution's opening statement, the prosecutor discussed the elements of the felon-in-possession charge, which included establishing that defendant was a felon. Following the proofs, the jury was instructed that the felon-in-possession charge required the prosecution to prove beyond a reasonable doubt each of the elements, including "that the defendant was previously convicted of a felony." This element was not disputed. In fact, the parties stipulated to the admission of a certified order that defendant was ineligible to possess a weapon on the date of the shooting because he had prior felony convictions. We will not second-guess matters of trial strategy or "assess counsel's competence with the benefit of hindsight." *Abcumby-Blair*, 335 Mich App at 237 (cleaned up). Even if trial counsel did render deficient performance by making the statement that defendant was a felon, defendant has not shown prejudice in light of the stipulation that he previously had been convicted of a felony. Accordingly, this claim of ineffective assistance of counsel fails.

IV. OTHER-ACTS EVIDENCE

In his Standard 4 brief, defendant argues that the trial court erred by allowing other-acts evidence under MRE 404(b) because there was insufficient evidence to corroborate the MRE 404(b) evidence and because the MRE 404(b) evidence constituted impermissible character evidence.

We review preserved issues regarding a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lowrey*, 342 Mich App 99, 108; 993 NW2d 62 (2022). "An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes." *People v Caddell*, 332 Mich App 27, 37; 955 NW2d 488 (2020) (cleaned up). "[W]hether a rule or statute precludes admission of evidence is a preliminary question of law that this Court reviews de novo." *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017).

Prior to the start of trial, the prosecution moved to admit evidence under MRE 404(b).[3] Specifically, the prosecution sought to admit testimony from the victim's neighbor about an incident that happened six weeks before the subject shooting when the neighbor observed defendant standing in the victim's driveway while shooting at a car that was driving down the street. The prosecution argued that both shootings were purposeful, goal-driven acts and sought to introduce the testimony to demonstrate: (1) defendant's intent to invoke fear, (2) defendant acted in a similar manner under a common scheme, plan or system to resort to using a gun to solve his problems, (3) absence of mistake or accident, and (4) to demonstrate defendant prepared to shoot

[3] The Michigan Rules of Evidence were substantially amended on September 20, 2023, effective January 1, 2024. See 512 Mich lxiii (2023). We rely on the version of the Michigan Rules of Evidence in effect at the time of trial.

the victim because defendant came to the victim's home carrying a weapon on both occasions. Defense counsel objected to the motion on the basis that the prosecution did not provide any evidence corroborating Cross's testimony about the prior shooting. The trial court admitted the evidence under MRE 404(b)(1) to show intent, common scheme, plan, and preparation.

Defendant argues that the trial court abused its discretion by allowing the prosecution to admit the other-acts evidence because there was no evidence that defendant was involved in the prior shooting and, further, it constituted inadmissible propensity evidence. Although defendant opposed the prosecution's motion to admit evidence under MRE 404(b) on the basis that there was no evidence corroborating the neighbor's testimony about the prior shooting, defendant did not argue that it amounted to impermissible character evidence. Accordingly, defendant's second argument is unpreserved. See *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019) ("To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal."). We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To obtain relief under plain-error review, a defendant must show that an error occurred, that it was clear or obvious, and that it was prejudicial, i.e., that it affected the outcome of the lower court proceedings. *Id*. at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (cleaned up).

With respect to defendant's first argument, defendant cites the "substantial evidence" requirement formulated in *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982). But our Supreme Court has rejected the "substantial evidence" requirement because it is not justified by MRE 404(b) or a corresponding statute. *People v VanderVliet*, 444 Mich 52, 68; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Consequently, defendant's substantial-evidence argument is unsupported.

Next, defendant argues that evidence of the prior shooting was inadmissible because it constituted inadmissible propensity evidence. "The general rule under MRE 404(b) is that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts." *Denson*, 500 Mich at 397. But such evidence can be admitted for other purposes. MRE 404(b)(1). The version of MRE 404(b) in effect at the time of trial provided the following:

> (1) 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.

In *VanderVliet*, our Supreme Court developed a four-prong test to determine whether evidence of other-acts is admissible under MRE 404(b):

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*VanderVliet*, 444 Mich at 55.]

The first prong of the *VanderVliet* test is whether the prosecution presented a proper nonpropensity purpose for the evidence. *Denson*, 500 Mich at 398. The prosecution sought to introduce the neighbor's testimony about the prior shooting to demonstrate defendant's "intent, preparation, plan, and scheme" with respect to the subject shooting. Specifically, the prosecution asserted the evidence showed "a common scheme or plan or system in doing an act in a similar manner, because [defendant] appears to resort to using a gun to solve his problems." The prosecution further argued that the evidence showed preparation because defendant came armed to the victim's home on both occasions. And the prosecution maintained that the evidence showed intent, as opposed to a mistake or accident, because it showed a purposeful, goal-driven act by shooting at moving vehicle. It is permissible to admit other-acts evidence to disprove self-defense or to show that the defendant was acting under a common scheme, plan, or system. We therefore conclude that the prosecution articulated a proper noncharacter purpose for admission of the other-acts evidence at issue.

Next, we must determine whether the other-acts evidence was logically relevant. *Id*. "Other-acts evidence is logically relevant if two components are present: materiality and probative value." *Id*. at 401. "Materiality is the requirement that the other-acts evidence be related to any fact that is of consequence to the action." *Id*. (cleaned up). Defendant argued that he acted in self-defense. Because the prosecution bore the burden of disproving that claim, the defense was generally at issue and relevant. See *id*.

But the other-acts evidence must also be probative. See *id*. at 402. "Evidence is probative if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*. at 401-402 (cleaned up). "[A]lthough the prosecution might claim a permissible purpose for the evidence under MRE 404(b), the prosecution must also *explain how* the evidence is relevant to that purpose without relying on a propensity inference." *Id*. "In evaluating whether the prosecution has provided an intermediate inference other than an impermissible character inference, we examine the similarity between a defendant's other act and the charged offense." *Id*. "If the prosecution creates a theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, we require a 'striking similarity' between the two acts to find the other act admissible." *Id*. at 403 (cleaned up).

The only apparent similarities between the two shootings were the shooter and location. In the prior shooting, defendant fired shots at a moving vehicle with unknown occupants. In the subject incident, defendant shot his brother near the conclusion of a spontaneous physical fight that had been ongoing for 10 to 15 minutes. The prior shooting did not involve the same victim, occurred under distinctly different circumstances, and did not involve a claim of self-defense like

this case. The fact that defendant was involved in a shooting six weeks earlier did not make it more probable that he lacked an honest and reasonable belief that deadly force was necessary to prevent his imminent death or great bodily harm when he shot the victim in the subject incident.

"[T]he other-acts evidence created a chain of inferences dependent on the preliminary conclusion that defendant had violent tendencies and acted consistently with those tendencies" in shooting the victim, which is "exactly the kind of propensity evidence that MRE 404(b) prohibits." *Id*. at 407-408. The trial court plainly erred by admitting the other-acts evidence.

Regardless, defendant cannot establish that the admission of this evidence affected his substantial rights, which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. There was no dispute that defendant shot the victim. Rather, the dispute centered around the circumstances of the shooting. Defendant testified that he shot the victim in his leg to get the victim to stop kicking him. But even if defendant had an honest and reasonable belief of imminent death or great bodily harm when he shot the victim in the leg, the prosecution established that the location of the victim's gunshot wounds to his left buttock and back of the head suggested that the victim was not on top of defendant and attacking defendant when those shots were fired. In fact, defendant testified that he was on top of the victim, who was lying on his back on the ground, when he fired the shots that hit the victim in the back of the head and his buttock. The AWIGBH charges were based on the shot to the back of the victim's head and the shot to his buttock. Reversal is not warranted. See *id*. ("Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.") (cleaned up).

V. INEFFECTIVE ASSISTANCE OF COUNSEL AND PROSECUTORIAL MISCONDUCT

Defendant's Standard 4 brief also includes in the statement of questions presented claims of error within the realm of ineffective assistance of counsel and prosecutorial misconduct. But defendant's statement of these questions claims he is missing relevant transcripts.[4] Defendant provides no factual basis for his argument, no analysis, or a single citation to relevant authorities. Defendant fails to explain how trial counsel's performance fell below an objective standard of reasonableness or how he was prejudiced by the alleged instances of ineffective assistance of counsel. He also fails to describe any alleged misconduct committed by the prosecution. Even criminal defendants proceeding *in propria persona* must provide some kind of support for their claims. See *Estelle v Gamble*, 429 US 97, 106-108; 97 S Ct 285; 50 L Ed 2d 251 (1976). Accordingly, we consider these issues abandoned. See People v McPherson, 263 Mich App 124,

[4] We note that the vast majority of the transcripts defendant claims to be lacking are available in the lower court record. Only three dates identified by defendant do not relate to available transcripts, and the record indicates that there were no recorded proceedings on those dates.

136, 687 N.W.2d 370 (2004) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.")."

Affirmed.

/s/ Kathleen Jansen
/s/ Michelle M. Rick
/s/ Sima G. Patel